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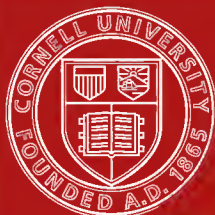
Real estate proceedings with precedents



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REAL ESTATE PROCEEDINGS

WITH

PRECEDENTS.

The Procedure and Practice in all Actions Affect-
ing Title to Real Property as Provided by
the Code of Civil Procedure, known as

SPECIAL PROVISIONS REGULATING ACTIONS
RELATING TO REAL PROPERTY.

INCLUDING ALL

ACTIONS AND SPECIAL PROCEEDINGS

RELATING TO

TITLE BY MORTGAGE FORECLOSURE, MECHANICS' LIENS,
ESTATES OF INCOMPETENTS, SALE OF DECE-
DENT'S REAL PROPERTY TO PAY DEBTS,
ACTIONS AGAINST HEIRS, ETC.,

WITH ALL

NECESSARY FORMS AND PRECEDENTS.

BY D. H. McFALLS,
JOHNSTOWN, N. Y.

ALBANY, N. Y.
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P R E F A C E .

The purpose of this work being to aid the busy lawyer in furnishing him a true guide in his actions and proceedings affecting real estate, the writer has no intention of taking his time with a lengthy preface, as the work, if it speaks at all, will speak for itself, and is here put forth with the hope and belief, that to some overworked brother it may afford a help and guide on his weary way.

D. H. McFALLS.

JOHNSTOWN, N. Y.

REAL ACTIONS.

CHAPTER I.

ACTIONS TO RECOVER REAL PROPERTY, COMMONLY KNOWN AS "ACTIONS IN EJECTMENT."

Jurisdiction.

The Supreme Court has exclusive jurisdiction of all actions in ejectment, and said actions must be tried in the county in which the subject thereof or some part is situate.

Code, §§ 217, 340, 982.

When maintained.

Ejectment is an action brought to establish a judicial determination of the title to land, and to remove those wrongfully in possession. The action will lie only for lands of which the possession thereof can be delivered by the sheriff on execution.

Child v. Chappell, 9 N. Y. 246; Carleton v. Darcy, 90 N. Y. 566; Code, §§ 1500 and 1501.

When lands can be possessed.

If the land can be possessed, it makes no difference if, at the time of the trial, it is so situated that the sheriff could not get it to deliver possession.

Woodhull v. Rosenthal, 61 N. Y. 382.

Such as land under water, made land or land covered by obstructions, lands subject to easements of a highway.

Etz v. Daily, 20 Barb. 32; Gaslight Co. v. R., W. & O. R. R. Co., 11 Civ. Pro. Rep. 239; Strong v. City of Brooklyn, 68 N. Y. 1.

Lands belonging to the State by escheat, or by conviction, or by outlawry for treason, or by forfeiture.

1 R. S. 666 (718), § 1.

The people may.

The Board of Fisheries, Game and Forest may bring an action, in the name of the people, to recover lands properly forming a part of the forest preserve and occupied or held by persons not entitled thereto, and said board may employ counsel to bring said action. Such actions shall be brought in the county where the land lies.

Laws 1892, ch. 488, § 280, as amended by Laws of 1896, ch. 114.

What a party out of possession must show.

A party out of possession who seeks to regain it, must show a good and sufficient title in himself, which must be legal and not equitable, and must have a right of entry or of possession at the time of the commencement of the suit, and at trial.

Smith v. McCann, 24 How. (U. S.) 398; Wait's Actions and Defenses, vol. 3, pp. 10-11.

For a forfeiture under a lease or conditional fee, see

Van Rensselaer v. Ball, 19 N. Y. 100.

Claim under color of title.

Claim under color of title may ripen into title by limitation, but must commence under color of title.

La Frombois v. Jackson, 8 Cow. 589.

Any fact which goes to disprove the plaintiff's right or the unlawful entry or unjust withholding constitutes a legal defense.

Stowe v. Russell, 36 Ill. 18.

When it cannot be maintained.

Code, §§ 1498 and 1499.

Will not lie for lands over which a projection extends (which is simply a nuisance for which damages can be recovered).

Aikin v. Benedict, 39 Barb. 400; Hoffman v. Armstrong, 48 N. Y., 201.

But in Leprell v. Kleinschmidt (112 N. Y. 364), the Court of Appeals left the question of projection undecided.

Nor for an easement as a right of way.

Redfield v. U. S. R. R. Co., 25 Barb. 54; also Wilklow v. Lane, 37 Barb. 244.

Nor for the right to use a wharf or pier. Nor for the right to flood lands. Nor for anything merely lying in grant and not capable of being delivered by execution. Nor for land covered by part of an adjoining house which was erected by a common owner of both lots. Nor as to mining rights. Nor against a municipal corporation for the public use of a street.

Child v. Chappell, 9 N. Y. 246; Wilklow v. Lane, 37 Barb. 244; Northern Turnpike Co. v. Smith, 15 Barb. 355; Bondage v. Warner, 2 Hill, 145; Rogers v. Suinisheimer, 50 N. Y. 646; Moore v. Brown, 139 N. Y. 127; Cowenhaven v. Brooklyn, 38 Barb. 9.

As to reservations under a grant.

See Jackson v. Buel, 9 Johns. 298; Jackson v. May, 16 Johns. 184.

What is necessary title.

Code, §§ 1503, 1504 and 1505; Clason v. Baldwin, 129 N. Y. 183.

Plaintiff can only recover upon the strength of his own title.

Roberts v. Bumgarten, 110 N. Y. 380.

And can take nothing by reason of defects in defendant's title.

Wallace v. Swinton, 64 N. Y. 188.

It must either appear that plaintiff has title, or that he has a prior actual possession by virtue of some subsisting interest in the premises.

Hunter v. Trustees of Sandy Hill, 6 Hill, 407; Pierce v. Tuttle, 53 Barb. 155; People v. Val Rensselaer, 9 N. Y. 291.

The action cannot be maintained upon a mere equitable title.

Risley v. Rice, 40 Hun, 585.

Except where the equitable owner is in possession as against a stranger in wrongful possession.

Murphy v. Loomis, 26 Hun, 659.

One having legal title can maintain an action against one in possession under a contract unless the vendee is

entitled to possession by express provisions, then it can only be maintained if the vendee is in default.

Risley v. Rice, 40 Hun, 585; Sedg. and Waite on Title to Land, § 394.

A mortgagee, or his assignee, or other representative, cannot maintain the action.

Code, § 1498.

One holding a conditional title, unless the condition is broken, can maintain the action.

Olmstead v. Harvey, 1 Barb. 102; Candee v. Burke, 1 Hun, 546.

And where land has been granted upon condition the grantor can maintain an action where there is a breach without notice.

Plumb v. Tubbs, 41 N. Y. 442.

The action cannot be maintained for dower.

Code, § 1499; Campbell v. Ellwanger, 81 Hun, 259.

A lessee may maintain the action as against a stranger, and also as against his lessor.

Trull v. Grangor, 88 N. Y. 115.

Where the conveyance is void because the grantor was out of possession the grantee, his devisees or heirs may maintain the action in the name of the grantor or his heirs. And the grantors in the void deed must be joined as plaintiffs.

Code, § 1501; Chamberlain v. Taylor, 92 N. Y. 348; Crowley et al. v. Murphy, 11 Misc. 579.

But the grantee cannot bring an action in his own name.

Lawber v. Kelly, 17 Abb. 452.

And that the plaintiff has conveyed while out of possession, is no defense.

Chamberlain v. Taylor, 92 N. Y. 348.

Remedy of a vendee.

The remedy of a vendee is by an action in trespass or ejectment and for mesne profits.

Preston v. Hawley, 139 N. Y. 296.

Action by the people.

The people are the owners of all the lands in the State that have not been granted or sold, and are deemed to possess the original and ultimate property in all the lands of the State, and being the source of title the people are presumed to be the owners of lands not granted or sold, until the contrary appears.

And in an action to recover the possession thereof brought by the people, it is sufficient in the first instance to entitle them to recover, to show that such premises are vacant, uninclosed and unoccupied.

People v. Livingston, 8 Barb. 253.

The people cannot maintain the action unless they have an interest in the land.

People v. Booth, 32 N. Y. 397.

Lands that are vacant and unoccupied, unimproved and uninclosed commons; defendants have not such a possession independent of a valid paper title, as will defeat an action by the State for ejectment.

Id.; People v. Livingston, 8 Barb. 253.

A grant obtained by fraud or misrepresentation cannot be attacked collaterally in an action of ejectment.

Id.

There must be a continuous possession for forty years to bar an action by the State.

Id.

As the plaintiff must recover on his own title, the defendant may defend his own title or the outstanding title which shows that the plaintiff lacks an element. Therefore, it is a general rule that the defendant may show an outstanding title which is paramount to that of the plaintiff, and it is not necessary to show that he holds it himself or is in any way connected with it.

Raynor v. Timerson, 46 Barb. 518.

Improvements.

The defendant, where he holds by color of title and has made improvements in good faith, may be allowed for such improvements in reduction of the rents and profits.

Code, § 1531; Ringhouse v. Kenman, 63 Ill. 230.

And if the defendant's holding is under color of title, the improvements will be presumed to have been made in good faith.

Id.

PARTIES.**Plaintiffs.**

Any person who is a joint tenant or tenant in common with one or more persons, should be made plaintiff.

Code, § 1500; Skinner v. Odenbach, 81 Hun, 315.

A grantee, his heir or devisee, but in the name of the immediate grantor or his heir, where the conveyance under which he claims is void because the grantor was out of possession.

Code, § 1501; Smith v. Long, 12 Abb. N. C. 113.

An infant may be plaintiff.

Code, § 1686.

Committee of a lunatic or incompetent person may be plaintiff.

Code, § 2340.

Personal representatives. An assignee of the lessee for life.

Moshier v. Yost, 33 Barb. 277.

Where a party who is a tenant for life or a term of years suffers judgment to go against him by consent or default, the one owning the reversion or remainder may, after the termination of the estate, maintain the action.

Code, § 1680.

Whoever is entitled to the possession of real estate, whether by legal or equitable title, may be plaintiff.

Clute v. Voris, 31 Barb. 511; Phillips v. Gorham, 17 N. Y. 270; Glacken v. Brown, 39 Hun, 295.

The widow who is guardian in socage of the children, heirs of her husband, may maintain an action in her own name for one-third of the land in her own right as devisee, and for two-thirds as guardian.

Moore v. Deyoe, 22 Hun, 208.

A grantor, lessor, or his heirs, devisees or assignee, who have a right to enter land when six months' rent or more is in arrears, may maintain an action without any demand for rent or re-entry.

Code, § 1504.

Notice of re-entry.

But where the right to re-enter is reserved and given to a grantor or lessor, in default of sufficient goods and chattels whereon to distrain for rent due, the re-entry may be made, or action to recover the property demised or granted, provided fifteen days' written notice has been given of his intention to re-enter.

Code, § 1505.

A wife who has properly left her husband, leaving him in possession of her own land, may maintain the action.

Wood v. Wood, 83 N. Y. 575; see Gould v. Gould, 29 How. 441.

A married woman may bring an action for her separate estate.

Code, § 450.

A lessee may bring an action before re-entry against a stranger and also against his lessor.

Trull v. Granger, 8 N. Y. 115.

When an action is brought by one with an equitable title, all persons must be before the court.

Boyd v. Boyd, 12 Misc. 119.

Executor of a lessor who had a lease for life may bring an action.

Van Rensselaer v. Hayes, 5 Den. 477.

A mortgagee, or his assignee, or their representative, cannot maintain an action.

Code, § 1498.

This applies also to a deed given which is in fact a mortgage.

Carr v. Carr, 52 N. Y. 521.

Nor can an action for dower be maintained in ejectment.
§ 1499.

The State cannot recover lands belonging to a municipal corporation.

People v. N. Y. Manhattan Beach R. R. Co., 84 N. Y. 565.

Two persons claiming the land in hostility to each other cannot join as plaintiffs.

Hubbell v. Lerch, 58 N. Y. 237.

An infant, after arriving at his majority, cannot bring an action for lands sold by them without a prior act of disaffirmance.

Voorhies v. Voorhies, 24 Barb. 150.

A tenant in common cannot bring an action as against the other tenants without showing ouster.

Code, § 1515; Edwards v. Bishop, 4 N. Y. 61.

But if he shows ouster he can.

Trustees, etc. v. Johnson, 66 Barb. 119.

A receiver in supplementary proceedings has the legal title of the judgment debtor and can bring the action.

Wing v. Dissel, 5 Hun, 190.

Or a trustee who is entitled to the possession of lands may recover it for his beneficiary.

Matter of Brewer, 43 Hun, 597.

The people can bring an action in case of escheat, etc.

Code, §§ 1977-1981.

Defendants.

If the property is actually occupied, the occupants thereof must be made parties defendants, and if not actually occupied, then any one exercising acts of ownership or claiming title thereto, or an interest therein must be.

Code, § 1502; Hennessy v. Paulsen, 147 N. Y. 255.

A landlord, remainderman, reversioner or otherwise, holding adversely to the plaintiff, must be defendants.

Strong v. City of Brooklyn, 68 N. Y. 1-10.

Whenever anyone enters upon and takes possession of the lands of another claiming title thereto; that is an unlawful entry and ouster, and he should be made party defendant.

Leprell v. Kleinschmidt, 112 N. Y. 364.

Where the deed is to a husband and wife, both are properly joined as defendants.

Stewart v. Patrick, 68 N. Y. 450.

A railroad which has taken possession of a street may be proceeded against in ejectment.

Wager v. Troy Union R. R. Co., 25 N. Y. 526.

The corporation and not the trustee of a religious society should be made the defendants.

Lucas v. Johnson, 8 Barb. 244.

A servant who actually occupied and possessed the premises, although for his employer, is a proper defendant; but if he does not actually occupy but is only working it then he is not a proper defendant.

Shaver v. McGrow, 12 Wend. 558.

One claiming under authority of the United States is a proper defendant.

Kaufman v. Lee, 106 U. S. 196.

Parole claim of title is sufficient to make one a defendant under section 1502 of the Code.

Abeel v. Van Gelder, 36 N. Y. 513.

Parties occupying different stories of a building with no claim to a lease of the land, are properly joined.

Pierce v. Ferris, 10 N. Y. 280.

One lawfully in possession under other defendants is a proper party.

Rank v. Levinus, 5 Civ. Pro. R. 368.

All actual occupants must be joined as defendants.

Ellicott v. Mosier, 7 N. Y. 201; Danihee v. Hyatt, 81 Hun, 238.

None but the occupants are *necessary* parties.

Bradt v. Church, 110 N. Y. 537.

As to those jointly possessed joined as defendants,

See Code, § 1516; Dillaye v. Wilson, 43 Barb. 261.

It is not necessary to join parties who are not occupants, but the court in its discretion may direct others to be brought in.

Code, § 452.

When a defendant sets up by answer that he occupies in severalty with other defendants, or jointly, one or more distinct parcels, and other defendants possess other parcels in severalty or jointly, the court may, upon application of plaintiff on terms, direct that the action be severed.

Code, § 1516; Hennessy v. Paulsen, 12 Misc. 384.

But this does not apply to apartments.

Code, § 1517.

Nor where defendant holds under other defendants.

Code, § 1518.

PROCEEDINGS.

New parties.

In order to bring in new parties it must be by motion, and notice thereof must be given to the adverse parties.

Death of a party.

Where, upon the death of a party, different persons succeed to the decedent's title in different distinct parcels, the court may direct, upon motion of either party, that the action be divided, and the successors be substituted as plaintiffs or defendants.

Code, § 1522.

And if the plaintiff seeks to recover damages, the court may divide the action into two actions.

Code, § 1523.

But he may proceed under the last two sections or under sections 755 to 766 of the Code.

Death of plaintiff.

In case of the death of plaintiff the widow need not join as plaintiffs with the heirs.

Ash v. Cook, 3 Abb. Pr. 389.

If a motion to bring in new parties be made by an assignee of the cause of action, notice must be given to the opposite parties and to the executors of the party whom he claims to represent.

Howard v. Taylor, 5 Duer. 604.

If a motion is made to bring in representatives of the deceased party, notice must be given to the representatives, and upon affidavit setting forth the death and that they are the successors in interest.

St. John v. Croel, 10 How. Pr. 253.

And the title of the party to be substituted must be contested on the motion.

Smith v. Zalinski, 26 Hun, 225.

The pleadings should always be made a part of the motion papers. No supplemental complaint is required, but the court may direct that a summons and complaint be served if he sees fit.

Code, § 760.

PLEADINGS.**Lis pendens.**

The plaintiff should file a notice of the pendency of the action with the complaint.

Code, § 1524.

Complaint.

The complaint must describe the property claimed with common certainty, so that from the description, possession of the property can be delivered to plaintiff.

Code, § 1511.

Damages.

The plaintiff may demand and in a proper case recover damages.

Code, § 1496.

Such a case is where the plaintiff is entitled to the rents and profits or the value of the use and occupation.
Code, § 1497.

But he cannot recover damages for more than six years, nor for the value of the use of any improvements made by defendant or those under whom he claims. And improvements that are permanent may in good faith, by defendant holding under color of title adversely to the plaintiff, be offset against the damages, to the amount of such damages.

Code, § 1531.

Plaintiff must state that he is out of possession and that possession is unlawfully withheld, and that he has an immediate right to the possession.

Taylor v. Crane, 15 How. Pr. 358; Trull v. Granger, 8 N. Y. 115.

It is not sufficient to state that he is entitled to possession; he must state the character of his estate; as in fee, for life, or for years, etc.

Austin v. Schluyter, 7 Hun, 275; Sheridan v. Jackson, 72 N. Y. 170.

The allegation that plaintiff has the lawful title as owner in fee simple of the following described lands, and that the defendant is in possession thereof, and unlawfully withholds possession thereof from the plaintiff, and demands that defendant be adjudged to surrender possession of said land to the plaintiff, is sufficient.

Walter v. Lockwood, 23 Barb. 228.

If an undivided interest is claimed it should be precisely stated.

Cook v. Wardens of St. Paul's Church, 5 Hun, 293.

But a defect in stating the amount or what interest, is amendable either before or after a verdict.

Id.

When damages are sought they must be set forth explicitly and in a separate paragraph.

Seaton v. Davis, 1 T. & C. 91.

If for rents and profits, plaintiff must state that defendant has received them, and the amount and demand therefor.

Code, § 1496; *Livingston v. Tanner*, 12 Barb. 481.

If for the value of the use and occupation plaintiff must so state.

Id.

If brought for a condition broken the facts showing the breach of the condition must be alleged.

Mayor, etc. v. Smith, 64 How. Pr. 89.

THE ANSWER.

Authority to bring.

The defendants may at any time before answering, require the attorney for plaintiff to produce his authority, and the case will be stayed till such authority is produced.

Code Civ. Pro., §§ 1512, 1513 and 1514.

The defendant may demur or answer. Under a general denial the defendant may disprove anything that it is necessary for the plaintiff to prove.

Weaver v. Barden, 49 N. Y. 286.

May show that the plaintiff is estopped, but it would be better to state the matters which constitute the estoppel.

Creque v. Sears, 17 Hun, 123, 125.

May show plaintiff has no title, and that the title is in a stranger, although defendant does not connect himself with such title.

Griffin v. L. I. R. R. Co., 101 N. Y. 348; *Bloom v. Burdick*, 1 Hill, 130.

If the defendant is an intruder or in possession by permission of the plaintiff, then he must set up the title on which he relies and connect himself with it.

Adverse possession or that the plaintiff's deed is void for any reason, and defendant claims an equitable right, must all be pleaded.

Ford v. Sampson, 30 Barb. 183; *Hanse v. Mead*, 27 Hun, 162.

A denial that plaintiff has title is sufficient, and it is not necessary to state that his title is invalid.

Terrell v. Wheeler, 12 N. Y. St. R. 597.

That defendant is in possession as mortgagee or as assignee of the mortgage is a good defense.

St. John v. Bumpstead, 17 Barb. 100.

But the mortgagee must be rightfully in possession.

Howell v. Leavitt, 95 N. Y. 617-621.

Anything tending to show plaintiff is not entitled to the immediate possession is a good defense.

Hunter v. Trustees of Sandy Hill, 6 Hill, 487.

May set up that he is equitably entitled to retain possession, or the equitable owner, or entitled to a deed, or that he was the intended grantee, but omitted by mistake.

Crary v. Goodman, 12 N. Y. 266; Hoppough v. Stubble, 60 N. Y. 430; Glacken v. Brown, 39 Hun, 294.

And if he desires affirmative relief must set forth all facts that would entitle him to it.

Dewey v. Hoag, 15 Barb. 365; Risley v. Rice, 40 Hun, 585; Terrell v. Wheeler, 12 N. Y. St. R. 597.

Defendant cannot plead an escheat to defeat plaintiff's title.

Croner v. Cowdrey, 139 N. Y. 471.

Vendee under an executory contract of sale must plead his equitable title, and tender performance.

Risley v. Rice, 40 Hun, 585.

Defendant, under purchase on execution sale, must show judgment and filing, and that he was in continued possession under valid judgment.

Kellogg v. Kellogg, 6 Barb. 126.

Reply.

If the defendant sets up a counterclaim upon which he demands an affirmative judgment or such as to defeat plaintiff's recovering for damages, then the plaintiff must make reply thereto.

Code, § 1673.

And the rule governing a reply is the same as in other actions.

Code, §§ 514-516.

PROCEEDINGS.

A defendant may demand authority for plaintiff's attorney to bring.

Anti, p. 13; Code, §§ 1512, 1513 and 1514.

A retainer from an agent is not enough unless such agent had authority from the principal to direct the commencement of the suit.

Howard v. Howard, 11 How. Pr. 80; Mitchell v. Barnes, 22 Hun, 194.

Receiver.

The court has the power to appoint a receiver of the property and the rents and profits, and in a proper case may.

People v. Mayor, etc., 10 Abb. Pr. 111.

But as the appointment amounts practically to the dispossession of the defendant, the rule is that a receiver will not be appointed before judgment.

Guernsey v. Powers, 9 Hun, 78.

The manner of appointment is the same as in other actions.

Injunction.

An injunction may be granted to stay a prosecution by a grantee to recover lands embraced in a deed by mistake.

Bush v. Hicks, 60 N. Y. 298.

Also an injunction will issue when, after judgment plaintiff has ceased to own the premises, or that defendant has acquired some interest in equity that should be protected, or that the judgment was obtained by fraud or collusion.

Knox v. McDonald, 25 Hun, 268.

To restrain defendant from committing waste or other damage to the property in question, an injunction will be granted.

Code, § 1681; Spear v. Cutter, 5 Barb. 486.

Survey.

Whenever it becomes necessary to enter upon lands to make a survey for any purpose, the court may so direct by order upon application of either party.

Code, §§ 1682, 1683 and 1684.

Jury.

The action is one triable by a jury.

Code, § 968.

Proof necessary by a tenant.

Where the action is brought by a tenant in common, or a joint tenant, against his co-tenant, the plaintiff, besides proving his right, must also prove that the defendant actually ousted him, or did some other act amounting to a total denial of his right.

Code, § 1515; *Edwards v. Bishop*, 4 N. Y. 61.

The issues, mode of trial, settling issues of fact or of law, are the same as in other civil actions, as found under sections 963 to 981, Code Civil Procedure.

The verdict.

The verdict, report or decision in favor of plaintiff must specify his estate, whether it is in fee, or for a term of years, or for life, stating for whose life, or the duration of the term if less than a fee.

Code, § 1519.

In an action to recover for possession for rent in arrears, the verdict, report or decision, must fix the amount of rent in arrears.

Code, § 1507.

If the right or title of plaintiff expires after commencement and before trial, and he would have been entitled to recover but for the expiration, then the verdict, report or decision must be rendered according to the fact, and he is entitled to damages to the time his title expires.

Code, § 1520.

The title referred to in section 1520 has reference to the estate or interest which is in the possession of plaintiff, or represented by him at the time, and not to the owner thereof. If the estate expires, judgment for possession will not be given against defendant, but if the estate continues to exist then judgment for possession will be rendered against defendant, and if plaintiff recovers then he

holds it as the trustee for the owner who, since commencement of the action has become the real party in interest.

Van Rensselaer v. Owen, 48 Barb. 61.

Defendant need not file a supplementary answer to avail himself of this section.

Lang v. Wilbraham, 2 Duer, 171.

When plaintiff's title expires after judgment and before affirmance on appeal, execution for possession will be stayed.

Olendorf v. Cook, 1 Lans. 37.

Judgments.

Judgment may be entered by default, but cannot be taken without application to the court, and where damages are demanded must be ascertained by the court, and the amount must be stated in the judgment.

Code, § 1507.

Except in a case where it is otherwise expressly described (such as an application for a new trial), a final judgment rendered upon a trial of an issue of fact is conclusive as to the title upon each party against whom it is rendered and every person claiming through or under him by title accruing either after judgment or the filing of the *lis pendens*.

Code, § 1524; Roberts v. Baumgarten, 126 N. Y. 336.

A final judgment for the plaintiff rendered in an action *otherwise* than upon a trial of an issue of *fact* is, after three years from the filing of the judgment roll, conclusive upon the defendant and every person claiming from, through or under him by title, after judgment roll is filed or the filing of the notice of action.

Code, § 1526; Howell v. Leavitt, 90 N. Y. 238.

The judgment should follow the verdict, or conclusions of law should state the estate and direct that plaintiff recover possession and whatever sum has been awarded as damages and costs.

The premises should be described so that the sheriff can identify them, and if the premises are subject to an ease-

ment, it should state that the possession of plaintiff is subject to such easement.

Reformed Church v. Schoolcraft, 65 N. Y. 134.

The nature of plaintiff's interest should always be stated, and if plaintiff's title has expired, judgment should be only for damages to such time.

Code, § 1520.

Or if possession is awarded to plaintiff then it should state that he holds it in trust for the true owner.

And it must contain an order that the sheriff put plaintiff in possession if possession is awarded.

Code, § 1675.

A judgment for the possession takes all structures wrongfully erected thereon.

Delancey v. Piegras, 141 N. Y. 88.

Costs.

Either party, upon a verdict in their favor, are entitled to costs, of course.

Code, §§ 3228 and 3229.

Defendant is not entitled to costs where the action is maintained by a grantee, his heir or devisee, in the name of the grantor, or his heir, unless defendant is entitled to costs under section 3229 of the Code.

Code, § 1501.

And plaintiff, who maintained the action, may be compelled to pay the same.

Code, § 3247.

Costs must, upon application by either party, be certified by the judge presiding or the referee, which certificate is the only competent evidence before the taxing officer.

Code, § 3248.

Amount of costs are the regular taxable costs, together with disbursements, and extra allowance will only be allowed upon the ground of a difficult case where a defense has been interposed.

Code, § 3253.

Execution.

Judgment is enforced by execution.

Code, § 1240.

The execution must particularly describe the property and designate the party to whom possession is awarded, and must direct the sheriff to deliver the possession to the party entitled thereto, and if a sum of money is awarded it may be included in the same execution or a separate execution may issue therefor omitting the direction to deliver the possession; if both are included in the same, the usual direction as to collecting the money in addition to the direction to deliver possession.

Code, §§ 1373 and 1511.

Proceedings after judgment.

Any time within six months after possession has been awarded plaintiff and delivered to him on execution in proceedings *for rent in arrears*, the defendant, or any person who has succeeded to his interest, or a mortgagee or assignee of the lease, who was not in possession when final judgment was rendered, may pay or tender to the plaintiff or his representative, or pay into court the rent, costs and disbursements and interest, and within three months after paying said sum the person so paying or his representatives, may apply for an order for possession, and upon proof of the facts, etc., the court must make an order directing that possession be delivered to the applicant. Notice of such application must be served upon plaintiff's attorney, and if possession of the property has been delivered to plaintiff, the order must offset the sum which plaintiff has or might have made out of the property as against the rent accruing after judgment, and the repayment to the applicant the balance, if any, of the money paid into court.

Code, §§ 1508, 1509 and 1510.

New trials.

A new trial in these actions may be had upon any ground applicable to any other action, and in addition thereto, the court at any time within three years after a

judgment upon an issue of fact upon application of the party, his heirs, devisees or assigns, against whom the judgment was rendered, and upon payment of all costs and damages *must* make an order granting a new trial. And the court within two years after the second final judgment, upon like application, *may* make an order granting a second new trial, but the court must be satisfied that justice will thereby be promoted.

Code, § 1525.

This section does not apply to ejectment for rent in arrears.

Code, § 1528.

Where an answer has been interposed, a judgment upon an inquest is within this section.

Sacid v. O'Connor, 47 Super. 53.

The application is made at Special Term upon affidavits setting forth the facts, that judgment was rendered and roll filed against the party applying, or his predecessor or assignor, and that three years have not elapsed, and that all costs and damages were paid.

Post v. Moran, 1 Civ. Pro. R. 222.

The first new trial is a matter of right, and no reason need be given for granting it.

Harris v. Waite, 54 How. Pr. 113.

The time for computing an application is from the entry of the judgment, and not from a judgment of affirmance.

Chautauqua Co. Bank v. White, 23 N. Y. 347.

Where one bought property subject to a mortgage and has been evicted, and the mortgage is afterwards foreclosed, the purchaser under the mortgage is an assignee, and entitled to a new trial.

Howell v. Leavitt, 90 N. Y. 238.

Upon the application for a second new trial the applicant must show that justice requires it, and that the right of the parties will be more satisfactorily ascertained and established.

Keeler v. Dennis, 39 Hun, 18; *Brown v. The Root Mfg. Co.*, 148 N. Y. 294; *De Laucey v. Piegras*, 141 N. Y. 88.

Each party is not entitled to new trials; only two new trials can be granted.

Harris v. Wait, 54 How. Pr. 113.

The order granting the second trial may be reviewed by the Appellate Court, but not by the Court of Appeals.

Keeler v. Dennis, 39 Hun, 18; Evans v. Millard, 16 N. Y. 619.

Appeal.

Appeal from a judgment entered by default can be taken within five years, after the filing of the judgment roll, upon application in the same manner as for a second new trial.

Code, § 1526.

This section does not prevent an application to open default as in other actions.

The time to appeal, as provided in section 1526, does not begin to run in case of defendant's disability, such as minority, incapacity, etc., until after said disability is removed.

Code, § 1527.

Upon a new trial being granted, defendant may show any matter in defense which he might be entitled to show to recover possession as if he were plaintiff.

Code, § 1530.

Plaintiff's title is not affected by the granting of a new trial, and if defendant recovers final judgment upon said trial, he may have execution as if he were plaintiff.

Code, § 1529.

PRECEDENTS.

Lis Pendens in Ejectment.

(See text, page 11.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.

Notice is hereby given that an action has been commenced in the Supreme Court of the State of New York, by the above-named plaintiff against the above-named defendant, and that it is now pending in said court; and, that the object of said action is to recover a judgment affecting the possession of the following described property, to wit: (Description); that said premises were, at the time of the commencement of this action, and at the time of the filing of this notice, situated in the county of _____, and contained _____ acres of land, more or less.

Dated at _____ this _____ day
 of _____, 189 _____.

.....

Plaintiff's Attorney.

Office and post-office address,

.....

To the County Clerk of the County of _____

Sir.— You are hereby directed to index the foregoing notice to the name of _____, defendant (or defendants) in the above-entitled action.

.....

Plaintiff's Attorney.

Complaint for Wrongful Possession.

(See text, page 12; and as to parties plaintiff and defendant, see text, pages 6 to 9.)

SUPREME COURT — FULTON COUNTY.

JOHN DOE, Plaintiff,

against

RICHARD ROE, Defendant.

The plaintiff complains of the above-named defendant, and respectfully shows to the court the following facts as constituting his cause of action:

First. Plaintiff alleges that he is and was, at the time of the commencement of this action, seized in fee (or here state what interest the plaintiff has, such as for life or as remainderman, or whatever estate he may have that would entitle him to the immediate possession), and entitled to the possession of the following-described property, situate in the county of Fulton, and State of New York, bounded and described as follows, to wit: (Here describe the property, giving sufficient and specific description so that a sheriff, upon execution, can place the plaintiff in possession of the exact property sued for), being the owner and entitled to the possession of that undivided part thereof, to wit: (Here describe the amount of interest for which the action is commenced, either the whole or an undivided portion thereof), and entitled to the possession of the same.

Second. Plaintiff further alleges that the defendant was, at the time of the commencement of this action, in possession of said property (or of the interest thereof, hereinbefore described), and unlawfully withholds the same from the plaintiff to the damage of the plaintiff in the sum of dollars (\$).

Wherefore, plaintiff demands judgment against the defendant for the recovery of the said described premises

.....

Office and post-office address,

.....

(Verification.)

(See text, page 12.)

SUPREME COURT — FULTON COUNTY.

against

RICHARD ROE, Defendant.

Second. That on and prior to the first day of _____, 189_____, plaintiff was possessed and entitled to the possession of said premises, and being so possessed thereof, the defendant did, on or about the _____ day of _____, 189_____, enter into, and upon said premises, and did take possession thereof, and is unlawfully in possession thereof, and is unlawfully withholding from plaintiff the possession of the same to plaintiff's damage in the sum of _____ dollars (\$_____).

1. That he is the owner in fee of said premises.

2. That he is entitled to the immediate possession thereof.

3. That he recover of the defendant the sum of dollars (\$) his damages, besides the costs of this action.

.....

Plaintiff's Attorney.

(Verification.)

Complaint for State Lands.

(See text, pages 2 and 5.)

SUPREME COURT — COUNTY OF

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, against JOHN DOE, Defendant.

The plaintiff complains of the defendant and alleges:

First. On information and belief, that at the time of the commencement of this action and prior thereto, plaintiff was the owner in fee and lawfully entitled to the immediate possession of a piece or parcel of land situate in the town of , county of and State of New York, being known and described as follows: (Description.)

Second. Plaintiff further alleges, on information and belief, that defendant, prior to the commencement of this action, unlawfully and wrongfully entered upon the above-described premises and erected a building or buildings thereon, and additions thereto, and was and is wrongfully and unlawfully in possession of said property, and still retains and unlawfully withholds the possession thereof from plaintiff to plaintiff's damage of \$.

Third. Plaintiff further alleges, on information and belief, that said above-described premises, of which defendant is in the unlawful and wrongful possession,

properly forms a part of and is a part of the forest preserve of the State of New York, and were at the time defendant went into possession vacant, uninclosed and unoccupied wild lands.

Fourth. Plaintiff further alleges that this action is brought pursuant to and on the order of J. Warren Pond, as Chief Fish and Game Protector and Forester of the State of New York, duly made, dated August 18, 1896, directed to the plaintiff's attorney herein, ordering the bringing of this action in the name of the plaintiff to recover the possession of the above-described premises.

Wherefore, plaintiff demands judgment against the defendant for the possession of the said described premises, with \$ damage for withholding the same, together with costs and disbursements.

CLARENCE W. SMITH,

Plaintiff's Attorney,

Johnstown, N. Y.

(Verification.)

Complaint by Joint-Tenant or Tenant in Common.

(See text, page 6.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff,

against

RICHARD ROE, Defendant.

The plaintiff complains of the defendant and alleges as follows:

First. That he, together with , of the of and county of and State of , are the owners of, and entitled to the possession of all that property hereinafter described, as joint-tenants (or tenants in common), by

virtue of the fact that this plaintiff, together with and _____, are the heirs-at-law, or devisees of one _____ who, during his lifetime was the owner of, and entitled to the possession of said property; that said _____ departed this life on the _____ day of _____, 189____, leaving a will, whereby he willed to this plaintiff and _____ and _____, all of said property, which said will is hereto annexed and marked "Exhibit A," and is to be taken as a part of this complaint, the same as if herein set forth in full (or that he died intestate, and that said plaintiff and the other parties herein, are the only heirs and next of kin of said decedent, and are the owners and entitled to the possession of said property by virtue thereof); (or that the said plaintiff and said other parties are grantees of the said described property by virtue of a deed made and executed by _____ to this plaintiff and the other parties, a copy of said deed is hereto annexed and marked "Exhibit A," and is to be taken as a part of this complaint the same as if herein set forth in full).

Second. Plaintiff further alleges that he and the other parties named herein are the owners of and entitled to the possession of said property; and that the defendant herein wrongfully and unlawfully entered into the possession of said property described as follows, to wit: (Description); and that he is still in the possession and unlawfully and wrongfully withholds the possession of said described property from this plaintiff, and to the plaintiff's damage of _____ dollars (\$_____).

Third. Plaintiff further alleges that he is the owner of and entitled to the undivided one-third share of said described property by virtue of the title hereinabove set forth.

Wherefore, plaintiff demands judgment, and that he be adjudged the possession of the undivided one-third share of said property; and that he recover of the defendant the

sum of dollars damages, for the withhold-
ing of the said property, together with the costs of this
action.

.....

Plaintiff's Attorney.

Office and post-office address,

.....

(Add verification in usual form.)

—————

Complaint by Grantee in the Name of His Grantor.

(See text, page 4).

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff,

against

RICHARD ROE, Defendant.

Plaintiff complains of the defendant and alleges:

First. That on the day of , 189 ,
he was the owner of and entitled to the possession of all
of the following described real estate, situate in the
county of Fulton and State of New York, bounded and
described as follows, to wit: (Description.)

Second. That at the time he was the owner of, and
entitled to the possession of said property, he did on the
 day of , 189 , by an instrument in
writing, duly convey unto , all of the
above-described property; and that at the time of said
conveyance the same was held adversely by the defendant
herein; and that said defendant is unlawfully and wrong-
fully in the possession of, and occupies the said property,
and holds the same by adverse title, to this plaintiff's
damage.

Third. Plaintiff further alleges that said occupancy
and holding by said defendant is illegal and void; and

that he was entitled to said property at the time of the conveyance hereinabove set forth.

Fourth. Plaintiff further alleges that he brings this action to recover the possession of said property for, and on behalf of, and for the benefit of _____, his grantee.

Wherefore, plaintiff demands judgment herein, that he be declared the owner of, and entitled to the possession of said property; and that the title of said defendant be declared null and void; and for such other and further relief as to the court seems just and proper.

.....

Plaintiff's Attorney.

Office and post-office address,

.....

(Verification.)

Notice of Intention to Re-enter.

(See text, page .)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

To (lessee):

Sir.—Take notice that default has been made in the payment of the rent reserved and payable under, and by virtue of the lease of real property made and executed by and between _____ and _____ (or grantor, lessor, or his heirs, devisees or assigns), on the day of _____, 189 ; and as said owner of said premises and entitled to the rent thereof, I do hereby intend to re-enter upon the lands described in said indenture and lease, in pursuance of the covenants, reservations and conditions therein contained (or here state that there is default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of the rent now due, as pro-

vided by the provisions given to me, as lessor of said property).

Dated at this day
of , 189 .

.....

(NOTE.— This notice must be served in writing at least fifteen days before the commencement of the action, upon the defendant personally, or by leaving it at his dwelling house or on the premises, with a person of suitable age and discretion, or if he has no dwelling house on the premises by posting it in a conspicuous place upon the premises.)

Complaint in an Action to Re-enter Property Under a Lease.

(See text, page .)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Plaintiff complains of the defendant and states the following facts that constitute this cause of action:

First. Plaintiff alleges that on the day of , 189 , (state that he was the heir, devisee or assignee or lessor, or grantor), he made and executed to the defendant herein, a certain indenture and lease of the following described property, to wit: (Description); that the said lease was made and executed between said parties hereto, and is as follows, to wit: (Here insert a copy of the lease.)

Second. That by the terms of said lease there was given and reserved to the plaintiff herein, the right in case of default of the payment of the rent in said lease, a stipulation to distrain a sufficiency of the goods and chattels of the defendant to pay any and all rents due, and in default thereof the right of re-entry (or here state that six [6] months rent or more is in arrears upon the ground

therein stated in said lease, reserving the right in said lease of re-entry at any time upon failure to pay the rent, as set forth in said lease upon the conditions therein stated).

Third. Plaintiff further alleges that no part of the rent reserved and conditioned to be paid as aforesaid, and falling due on the day of , 189 , has ever been paid; and that there is now due and owing to the plaintiff thereof for rent; and that there is still due and unpaid the sum of dollars (\$).

Fourth. Plaintiff further alleges that prior to the commencement of this action, and more than fifteen days prior thereto, to wit, on the day of , 189 , he served or caused to be served upon the defendant a written notice of his intention to re-enter upon the possession of said premises, which said notice, a copy thereof is hereto annexed, and is as follows, to wit: (Set forth a copy of said notice.)

Fifth. That the defendant was, at the commencement of this action, in possession of said premises, having entered upon the same as party of the second part, according to the terms and conditions of said indenture and lease; and that as such lessor he has not a sufficiency of goods and chattels, which plaintiff, as the owner of said premises, can distrain in satisfaction of the said amount now due, and owing (or here state that the amount of said rent now due is for six months or more in arrears).

Wherefore, plaintiff demands judgment against the defendant, and that he be entitled to recover the possession of said premises, together with the costs of this action.

.....

Attorney for Plaintiff.

Office and post-office address,

.....

(Add verification in usual form.)

**Order Dismissing the Complaint Upon the Payment or
Tender of Rent.**

(See text, page .)

At a Special Term of the Supreme Court of the
State of New York, held at the in
the city of , on the day
of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

It appearing to the court that heretofore and on the
day of , 189 , an action was com-
menced by the above-named plaintiff against the above-
named defendant, to recover the possession of certain
premises in said complaint described, and in default of
the payment of rent by, and according to the conditions
and reservations of a certain lease as in said complaint
set forth, and there fully described; giving to the plaintiff
the right to re-enter and take possession of said premises
in default of the payment of said rent; and it appearing
to the court on the day of , 189 ,
the defendant has paid or tendered to the plaintiff or his
certain attorney (or has paid into court), all of the rent
therein, in arrears as stated, together with the interest
thereon, and the costs of this action as taxed at
dollars (\$); now, therefore, on motion of F. L. A.,
attorney for defendant, and , attorney for
plaintiff in opposition thereto, it is

Ordered, adjudged and decreed, That the complaint
herein and all other proceedings herein are hereby
dismissed.

.....

J. S. C.

Enter in Fulton county.

**Verdict, Report or Decision in Favor of the Plaintiff to
Recover for Rent Due.**

(See text, page 16.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

(The verdict, report or decision), do hereby find in favor of the plaintiff and against the defendant; and that the defendant is indebted to the plaintiff for rent in the amount of dollars (\$).

.....

Judgment on Default to Recover Possession by Landlord.

At a Special Term of the Supreme Court held at
the in the city of , on
the day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF .

(Title of the action.)

It appearing to the court that on the day of , 189 , the above-entitled action was duly commenced, by the service of a summons and complaint upon the defendant herein, by personally delivering to, and leaving with him a true copy of said summons and complaint; and it further appearing to the court that said defendant has failed to appear or answer the said complaint, and that more than twenty (20) days has elapsed since said service was made, and that said defendant is in default, and has not appeared or answered said complaint; now, on motion of C. W. S., attorney for the plaintiff, it is

Ordered, adjudged and decreed, That the said defendant is in arrears in the payment of the rent due and owing

being the amount of rent in arrears as stated in said judgment and the costs of this action, with interest and all other charges incurred by the plaintiff; and that three (3) months have not elapsed since the payment or tender of said monies as aforesaid.

.....

Subscribed and sworn to before me this

day of , 189 .

E. J. O'C.,

Notary Public.

Notice of the Application to Apply to the Court for Possession.

(See text, page 19.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To

Take notice that upon the affidavit hereto annexed and duly served upon you, the undersigned attorney for the herein will apply to this court at a Special Term thereof, to be held in the city of , on the day of , 189 , at 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order directing that possession of all the property as set forth in said affidavit be delivered to .

.....

Attorney for

Office and post-office address,

.....

Order Directing Property to be Delivered to Applicant.

(See text, page 19.)

At a Special Term of the Supreme Court of the
State of New York, held at the chambers of
Mr. Justice , in the city of ,
on the day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

It appearing to the court that upon the day
of , 189 , judgment was duly entered in the
above-entitled action, wherein was plaintiff,
and was defendant, ordering and directing
that the possession of certain premises described in said
judgment be delivered to the plaintiff therein; and that
he have and recover of the defendant the sum of
dollars (\$), as the amount of the rent in arrears,
together with the sum of dollars (\$),
costs in said action, and interest and all other charges
incurred by the plaintiff, and it further appearing to the
court that within six (6) months after execution had
issued upon said judgment and the property delivered
upon said execution to the plaintiff, that the said sum of
dollars had been paid into court (or been ten-
dered to the plaintiff, his executors, administrators, heirs
or certain attorney), being the amount of rent in arrears
as stated in said judgment, together with the costs of this
action, and interest thereon, and all other charges in-
curred by the plaintiff; and it further appearing to the
court that within three months after said payment (or
tender), defendant (or whoever succeeded to defendant's
interest), gave due notice, which were duly served upon
plaintiff's attorney herein, that he would apply to this
court at this term for an order directing that the posses-

sion of said property be delivered to him as applicant; now, on motion of R. P. A., attorney for said applicant, and H. D., attorney for plaintiff in opposition therto, it is

Ordered, adjudged and decreed, That said applicant be and he hereby is let into the possession of all of said property, and it is hereby directed to be delivered to the said
 , to have and hold the same and enjoy the same according to the terms and conditions of said original lease herein.

M. L. S.,
 J. S. C.

Enter in Fulton.

(NOTE.— See text, page 19, as to set-off, where plaintiff has been in possession.)

Affidavit on Succeeding to Title.

(See text, pages 10 and 11.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.
--

STATE OF NEW YORK, } ss.:
County of Fulton,

, being duly sworn, says that he is the (heir-at-law, devisee, next of kin, or assignee of plaintiff), and that after the commencement of this action, and on or about the day of , plaintiff died, leaving a last will and testament, which was afterwards admitted to probate by the surrogate of the county of Fulton, the county in which said deceased resided at the time of his death; and that deponent is the sole heir-at-law of said deceased, and has succeeded as such to the title and interest of said deceased in and to said real es-

tate (or here state what title and right deponent may have), and he asks that said action be divided, and that he may be substituted as plaintiff, in the place and stead of _____, plaintiff, in the action relating thereto.

..... Sig.

(Jurat.)

Motion to be Substituted.

(See text, page 11.)

SUPREME COURT — FULTON COUNTY.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.

To _____, Defendant's Attorney:

Take notice that I will move the court, at a Special Term of the Supreme Court, to be held at the _____, in the city of _____, on the _____ day of _____ 189____, for an order directing that the above-entitled action may be divided; and that I may be substituted as plaintiff therein, in the place and stead of _____, plaintiff, who died since the commencement of this action; that said motion is based upon the affidavit of _____, which is hereto annexed, and the papers and pleadings herein.

Dated at _____, this _____ day of _____, 189____.

.....

Attorney for Applicant.

Order to Divide the Action and to Substitute Plaintiff.

(See text, page 11.)

At a Special Term of the Supreme Court of the
State of New York, held at the chambers of
the Hon. _____, in the city of _____,
on the _____ day of _____, 189 .

Present — Hon. M. L. K., Justice.

SUPREME COURT — FULTON COUNTY.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.
--

On reading and filing the affidavit of _____, verified
on the _____ day of _____, 189 , by which it appears
that _____, the plaintiff in the above-entitled action,
has died since the commencement of this action; and that
_____ has succeeded to the title and interest of said
deceased party, in and to different and distinct parcels of
the premises so to be recovered in this action; and due
proof of service of a copy of said affidavit and notice of
this motion having been duly served upon _____, at-
torney for the defendant herein, and upon all the plead-
ings and papers in said action, now, on motion of _____,
attorney for said applicant, it is

Ordered, That the said action be divided into separate
actions; one by said _____, as plaintiff and against
the defendant, for the recovery of the parcel to which he
has succeeded, and the other by said _____ against
the defendant for the recovery of the said parcel to which
he has succeeded, as said parcel is respectfully described
and set forth; and that _____ be and he hereby is
adjudged to be substituted in the place and stead of .

, the deceased plaintiff in this action, and that
an order be entered accordingly.

.....

J. S. C.

Enter in Fulton.

Affidavit to Produce Authority.

(See text, page 13.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff,

against

RICHARD ROE, Defendant.

STATE OF NEW YORK, }
County of Fulton, } ss.:

Richard Roe, being duly sworn, says that he is the defendant in the above-entitled action; and that there has not been served upon him any authority on behalf of plaintiff's attorney, whereby and showing that said attorney has any right or authority to commence, on behalf of said plaintiff, the above-entitled action, as he is informed and verily believes said attorney has no authority herein, to commence said action, and therefore asks the court for an order directing said attorney to produce such evidence of authority.

.....

Subscribed and sworn to before me this

day of , 189 .

E. J. O'C.,

Notary Public,

Fulton County.

Order to Produce Authority.

(See text, page 13.)

At a Special Term of the Supreme Court of the
State of New York, held at the chambers of
M. L. S., Justice of the Supreme Court, in the
city of Amsterdam, N. Y., on the day
of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.
--

It appearing to the court upon the affidavit of Richard Roe, defendant in the above-entitled action, that , attorney for the plaintiff herein, has no authority to bring the above-entitled action in the name of the plaintiff, and no authority to commence said action; therefore, it is

Ordered, That said attorney is hereby ordered and directed to produce such evidence of his authority to commence said action as will satisfy this court; and that all proceedings herein are stayed on the part of the plaintiff until such evidence is produced.

Enter in Fulton county.

M. L. S.,
J. S. C.

Affidavit of Authority to Bring Action.

(See text, page 13.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.
--

STATE OF NEW YORK, }
County of Fulton, } ss.:

, of Johnstown, N. Y., attorney and counselor-at-law, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action, and has been duly authorized by him to bring this action in his name; a copy of said authority is hereto attached (or set out in full the authority from the plaintiff authorizing the attorney to bring the action herein in his name); that the said writing was duly signed and delivered to said deponent on the day of , 189 , duly authorizing him, the said deponent, to bring the above-entitled action.

..... Sig.

(Jurat.)

Notice of Authority.

(See text, page 13.)

SUPREME COURT — FULTON COUNTY.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.
--

To Richard Roe, the defendant in the above-entitled action, and , his Attorney:

Gentlemen.—Take notice that the above is a copy of the affidavit of the plaintiff's attorney herein, setting

forth his authority, to bring the above-entitled action in the name of the plaintiff herein.

.....

Plaintiff's Attorney.

Dated at this day
 of , 189 .

Answer of Defendant Setting up Title.

(See text, page 14.)

SUPREME COURT — FULTON COUNTY.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.
--

The defendant for answer to the plaintiff's complaint herein:

First. Denies that he has any knowledge or information as to paragraphs Nos. in plaintiff's complaint, sufficient to form a belief.

Second. Defendant, for further answer to plaintiff's complaint, alleges that he entered into possession of said premises under claim of title, exclusive of any other right to said claim, upon a written instrument, to wit, a deed from one to , being a conveyance of the premises as set forth in plaintiff's complaint (or set out fully defendant's title or source of title), for the following described lands and premises, viz.: (Description.)

Third. Defendant further alleges that he has been in continued and uninterrupted occupation and possession of the premises thereinabove described in said deed, and in plaintiff's complaint for twenty (20) years or upwards last, before the commencement of this action (or allege that defendant has been in uninterrupted possession of a

part of said premises, describing the part of which he claims title).

Fourth. Defendant further alleges that during the time or times he has been occupying said premises, and was in possession thereof, he placed thereupon permanent improvements, believing that he had a good and valid title to said lands and premises; and that said permanent improvements were placed thereon by him under said title to the amount and value of dollars (\$).

Wherefore, defendant asks for a dismissal of plaintiff's complaint, and for costs of this action.

I. That if the court should find he was not entitled to hold said lands, and was not entitled to the possession thereof, he should be allowed for the permanent improvements thereof to the amount of dollars placed by him upon said lands and premises.

II. For such other and further relief as to the court seems just.

.....
 Defendant's Attorney.
Office and post-office address,
.....
(Verification.)

Answer to an Action by the People.
(See text, pages 5 and 13.)

SUPREME COURT — FULTON COUNTY.

THE PEOPLE OF THE STATE, Plaintiff, against JOHN DOE, Defendant.

The defendant, John Doe, answers the plaintiff's complaint in this action, entitled above, as follows:

First. This defendant denies, upon information and belief, all the allegations, and each and every allegation thereof contained, designated as items or paragraphs "First," "Second" and "Third," therein.

Second. This defendant denies that he has any knowledge or information thereof sufficient to form a belief as to all and each and every allegation contained in the part or portion of the plaintiff's complaint designated as item or paragraph "Fourth" therein; and this defendant alleges, upon his information and belief, that the alleged "Chief Fish and Game Protector and Forester of the State of New York," had no legal right or authority to direct or order this action to be commenced as alleged in plaintiff's complaint, and this action was never legally authorized to be commenced or prosecuted, and is not now legally pending or authorized to be prosecuted in the name of the present designated plaintiff, or by Clarence W. Smith, as attorney for the plaintiff, and that jurisdiction has never been conferred upon this court to hear and determine the same between the said parties hereto.

Third. This defendant alleges, upon information and belief, that at the time and times mentioned in the plaintiff's complaint, he was, for a long time prior thereto, and ever since has been, and still is, the lawful owner and occupant, and in actual and lawful possession of the lands and premises mentioned in said complaint, lawfully claiming to own, hold, occupy and possess the same and the title thereto, adversely to the plaintiff and all other persons or parties; and that for forty years or more prior to the commencement of this action the defendant, his grantors, and his and their grantors, and his and their grantors and predecessors in title and interest lawfully owned, occupied, possessed and claimed to own, hold, occupy and possess the same and the title thereto, adversely to the plaintiff and all other persons and parties.

Fourth. This defendant further alleges, as a partial defense, that prior to the commencement of this action, while he was holding and in actual possession of the lands and premises mentioned and described in the plaintiff's complaint, under color and claim of title adversely to plaintiff, he made permanent improvements thereon in good faith, by erecting and making valuable and permanent buildings and betterments upon and about the said premises in good faith, of the value of \$4,000, which he asks to have offset and allowed to him in reduction of the damages, if any, that the plaintiff may be entitled to recover in this action.

Wherefore, the defendant demands judgment in this action:

I. That the plaintiff's complaint herein be dismissed, with costs of the action.

II. That the defendant may have such other or further judgment and relief herein as he may be entitled to or the court may grant.

Z. S. WESTBROOK,

Attorney for Defendant,

(Verification.)

Amsterdam, N. Y.

Answer That One or More of the Defendants Occupy in Severalty.

(See text, pages 13 and 14.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff,

against

RICHARD ROE et al., Defendants.

The defendant, Richard Roe, for answer to the plaintiff's complaint herein:

First. Denies that he has any knowledge or information as to paragraphs Nos. _____ of plaintiff's complaint sufficient to form a belief.

Second. The defendant, for a separate answer to said plaintiff's complaint, alleges that he and _____, one of the other defendants herein, occupy as joint-tenants, and as owners thereof, and are entitled to all that certain separate piece or parcel of said described lands as set forth in plaintiff's complaint, which said distinct parcel is described as follows, viz.: (Description); and, that the other defendants occupy and possess the other parcel of said described land in severalty (or jointly).

Wherefore, defendant asks for a dismissal of plaintiff's complaint, together with its costs.

.....

Defendant's Attorney.

Office and post-office address,

.....

(Add verification in the usual form.)

Verdict, Report or Decision to Recover Possession.

(See text, page 16.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff,

against

RICHARD ROE, Defendant.

The above-entitled matter having been submitted to the jury (or submitted to me as referee, or to the court), we do hereby find a verdict in favor of the plaintiff, and against the defendant; and that said plaintiff have, and recover of the said defendant, the possession of the following described property, to wit: (Description); and we do further find that the estate of the plaintiff in said property is in fee (or for life, or for a term of years; and if for life, that it is for and during the life of A. B., and

if for a term of years, that it is for and during the term of _____ years); and that the plaintiff is entitled to recover of the defendant the sum of _____ dollars as damages for the withholding of the said property.

.....

Verdict Upon the Expiration of Plaintiff's Right to Maintain Action.

(See text, page 16.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

The above-entitled action having been submitted to the jury (or to me, as referee, or to the court), we do hereby find a verdict (or report, or decision), in favor of the plaintiff and against the defendant; that since the commencement of this action, and before the trial, the right of said plaintiff to maintain said action has expired; he is therefore entitled to recover of the defendant the sum of _____ dollars (\$ _____), as damages, for the withholding of the property from the _____ day of _____, 189____, to the _____ day of _____, 189____, the time when his right to said title so expired.

..... Sig.

Judgment on Verdict.

(See text, page 17.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

The above-entitled cause having been brought to trial before his honor, M. L. S., Justice of the Supreme Court, and a jury, to try and determine the right of possession of the following described lands: (Description); and having found a verdict in favor of the plaintiff; and that he was

entitled to the possession of the property above described, and as set forth in the complaint; and said verdict having been duly received and filed, it is now

Ordered and adjudged, That the plaintiff have and recover of the defendant the possession of the property above described (or if the jury, having found that he is entitled to possession of said premises for life or for a term of years, state for whose life, or for what number of years he is entitled to said property).

Second. And, the jury having assessed the damages to which plaintiff is entitled to recover, by reason of the withholding of the same by the defendant, and that he is damaged in the sum of dollars (\$), it is further

Adjudged, That the said plaintiff may recover from the said defendant the sum of dollars, as his damages for the withholding of the same (or if the jury should find that the defendant is entitled to the sum of dollars for permanent improvements placed upon said property in question by him, which said improvements does not exceed the amount of damages found by the jury then (here state the amount so found by the jury).

Third. It is further adjudged, That said plaintiff have and recover of said defendant the sum of dollars (\$), as his costs and disbursements of this action; and that execution do issue in favor of said plaintiff and against said defendant, for the restoring of said property, and for said damages and the costs and disbursements of this action.

.....

County Clerk,
Fulton County.

**Judgment for Damages, Only Where Plaintiff's Title Expires
Before Trial.**

(See text, page 17.)

SUPREME COURT — COUNTY OF FULTON.

JOHN DOE, Plaintiff, against RICHARD ROE, Defendant.

The above-entitled action having been duly commenced on the day of , 189 , by the service of a summons and complaint herein, personally upon the defendant, and the issue therein having been duly joined on the day of , 189 , by a service of an answer therein; and said action having been duly brought to trial on the day of , 189 , before his honor, Justice Kellogg, and a jury; and it appearing upon said trial that the title of the plaintiff in said premises had expired on the day of , 189 , which title had expired prior to the trial of this action, and the jury therein having found a verdict in favor of the plaintiff and against the defendant, for damages for the withholding of said premises up to said time, it is now

Adjudged, That the plaintiff, , recover of the defendant, , the sum of dollars damages for the withholding of the premises described in the complaint prior to the day of , 189 , when plaintiff's title expired; also for dollars costs of this action, amounting in all to the sum of dollars (\$); and as to the possession of said premises, it is further

Adjudged, That the defendant is entitled to the possession of said property from said date when plaintiff's title expired, as against the plaintiff.

C. H. BUTLER,
County Clerk.

(See text, page 20.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

STATE OF NEW YORK, } ss.:
County of Fulton, }

_____, of _____, being duly sworn,
 says that on the _____ day of _____, 189 _____, and within
 three years, a final judgment was rendered by the
 Court in the above-entitled action in favor of the plaintiff
 and against the defendant (or defendants), for the recovery of the possession of certain real property situate in
 the county of _____, bounded and described as follows, to wit: (Description), with _____ dollars
 (\$ _____) damages and costs.

That the judgment-roll upon said judgment was filed in the clerk's office of Fulton county, on said day of _____, and that said judgment was rendered upon (either a trial report of referee or by the court, or by default; if, since the judgment was rendered, the defendant has died, state who has succeeded to his interest in said property); that the amount of costs and damages awarded by said judgment to said plaintiff therein for rents and profits, and for use and occupation, is the sum of _____ dollars (\$ _____), with interest thereon from the day of _____, and that said action was not brought for rent in arrears; and that deponent is ready and willing to pay all costs and damages other than for rents and profits or for use and occupation awarded against him, as the condition of obtaining a new trial in the above-entitled action.

(Jurat.)

Notice of Motion for a New Trial.

(See text, page 20.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To

Sir.—Take notice that upon the affidavit hereto annexed and upon all papers and proceedings in the above-entitled action, a motion will be made at a term of the Supreme Court on the day of , 189 , for an order vacating the final judgment rendered in the above-entitled action, and granting a new trial therein upon payment of the costs and damages awarded by said judgment to the plaintiff, other than for rents and profits, or for use and occupation, and for such other and further relief as may be proper.

.....
Plaintiff's Attorney,
.....

Order Granting New Trial.

(See text, pages 19 and 20.)

At a Special (or Trial) term of the Supreme Court held at the Court House in the city of Johnstown, Fulton county, N. Y. (or at the chambers).

Present — Hon. M. L. S., Justice.

(Title of the cause.)

On reading and filing the affidavit of , dated , 18 , with proof of due service thereof, and of notice of this motion upon the plaintiff's attorney, and on reading (whatever papers there may be opposing the same).

Now, on motion of , of counsel for the de-

fendant, after hearing _____, of counsel for the plaintiff, it is hereby

Ordered, That the judgment rendered in the above-entitled action by the _____ Court, on the _____ day of _____, 18____, on which day the judgment roll thereon was filed in the Fulton county clerk's office, be and the same is hereby vacated, and that a new trial in said action be and the same is hereby granted upon payment by the defendant to the plaintiff of \$ _____, being the amount of costs and damages other than for rents and profits, or for use and occupation awarded thereby to the plaintiff (or that it be referred to _____, to ascertain the costs and damages other than for rents and profits or for use and occupation).

M. L. S.,
J. S. C.

Enter in Fulton.

CHAPTER II.

PARTITION.

Place of trial.

The action of partition must be brought in either the Supreme Court or in the County Court, and the place of trial must be had in the county where the property is situate.

Code, §§ 217, 340 and 982.

For what property.

The action may be maintained for any real property held in common by two or more persons as tenants in common or as joint tenants.

Code, § 1532; *Jooss v. Fey et al.*, 129 N. Y. 17; *Weston v. Stoddard et al.*, 137 N. Y. 119.

No separate action for several tracts without consent.

Where several tracts are owned in common no separate action can be maintained for a part only, without the written consent of all, and if brought without such consent then the plaintiff's share is chargeable with the whole cost.

Supreme Court rule 65.

PARTIES TO THE ACTION.**Plaintiffs.**

Any one or more persons who are joint tenants or tenants in common who have an estate in inheritance, for life or for years, may maintain the action, and if no partition can be had then for a sale.

Code, § 1532; *Tilton v. Vail*, 25 N. Y. St. Rep. 212.

Vested remainder or reversion.

Any one or more who are joint tenants or tenants in common who have a vested remainder or reversion, may maintain an action for partition, but no sale can be had

thereof except by consent by deed of the persons holding the estate.

Code, § 1533; Scheu v. Lehning, 31 Hun, 183; Prior v. Hall, 41 Hun, 613; Prior v. Hall, 49 Hun, 502.

When complaint dismissed.

And if such partition or sale would work great prejudice to the owners the complaint must be dismissed. But a dismissal is not a bar to the right to bring a new action when the prior estate has terminated.

Code, § 1533; Van Brunt v. Van Brunt, 14 N. Y. St. Rep. 887.

Action on void devise.

Any person claiming to be a joint tenant or tenant in common by reason of being an heir of a person holding and in possession of any real property, may bring an action in partition after the death of such person, notwithstanding such property has been devised to another, but he must allege and establish that such devise is void.

Code, § 1537; Bell v. Gittere, 14 N. Y. St. Rep. 61; Ellerson v. Westcott, 148 N. Y. 149.

Who can maintain the action.

The action can only be maintained by a joint tenant or tenant in common.

Code, § 1538; Nellis v. Nellis, 99 N. Y. 505.

Action by an incompetent.

The action can be brought by an infant idiot or a lunatic upon authority of the surrogate.

Code, §§ 1534 and 1590.

And without such authority the action is irregular.

Struppman v. Muller, 52 How. Pr. 211.

A trustee for the benefit of an infant, with absolute power to sell and having possession, may bring the action in his own name.

Gallie v. Eagle, 65 Barb. 583.

A cestui que trust cannot.

Morse v. Morse, 85 N. Y. 53.

An assignee for the benefit of creditors may.

Rutherford v. Hewey, 59 How. Pr. 231; Van Arsdale v. Drake, 2 Barb. 599.

A receiver in supplementary proceedings cannot.

Payne v. Becker, 87 N. Y. 153.

One interested only in the proceeds of the real estate cannot.

Davis v. Davis, 15 Week. Dig. 118.

Action in regard to State lands.

The Attorney-General of the State shall, at the request of the Board of Fishery, Game and Forestry, bring an action in the name of the people for actual partition. Whenever the State owns an undivided interest in lands of the forest preserves or holds and is in possession of such lands as joint tenants or tenants in common with any person. And any such person upon obtaining the written consent of the board, may maintain any such action. And service upon the Attorney-General shall be deemed service upon the State. The proceedings shall be the same in all other respects as other like actions, except no costs shall be allowed against the State, and no sale of such lands.

Laws 1895, ch. 395, § 273.

And the Board of Fishery, Game and Forest may, without action but with the consent of the Comptroller, agree with any person or persons owning lands within the forest preserves jointly or as tenants in common with the State, for partition of such lands, and on such agreement and consent of the Comptroller shall make on behalf of the State any conveyance necessary and proper on such partition, and such conveyance shall be forthwith recorded as now provided by law as to conveyance made by the Commissioners of the Land Office.

Laws 1895, ch. 395, § 273.

Action by married women.

A married woman may maintain the action without joining her husband, and even against him.

Code, § 450; Moore v. Moore, 47 N. Y. 467.

Tenants, by the courtesy of an undivided interest, may maintain the action.

Tilton v. Vail, 42 Hun, 638.

Defendants.

Every person having an undivided share in possession or otherwise as a tenant in fee, for life, by courtesy or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency, contained in a devise or grant, or otherwise, is, or may become entitled to a beneficial interest in the undivided share thereof; every person having an inchoate right of dower in an undivided share; every person having a right of dower in the property or any part thereof which has not been admeasured, must be made parties defendant.

Code, § 1538; *Tilton v. Vail*, 25 N. Y. St. Rep. 212.

Title by descent.

Whenever an action shall be brought by a party who derived title from an estate of a deceased, within three years after letters have been issued, the executors or administrator must be made defendants; if none have been appointed that fact must be alleged in the complaint.

Code, § 1538.

Necessary parties defendant.

In order to clear the title from all claim, it is necessary to make a tenant by the courtesy for life or for years, or any person entitled to a contingent or vested remainder, or reversion, or a creditor, or other person who has a lien or interest which attaches to the property, or a creditor who has a lien on the property, or any share, should be made defendants.

Code, §§ 1539 and 1540; *Mapes v. Brown*, 14 Abb. N. C. 94.

Devisees who take a contingent fee limited upon a prior devise are necessary defendants, although the owners of the prior estate are living.

Nellis v. Nellis, 99 N. Y. 505.

One who is entitled to a remainder in fee devised in trust should be made a defendant.

Moore v. Appleby, 36 Hun, 368.

Upon death of either party.

If, upon the death of either plaintiff or defendant, and his interest passes to one not a party, he may be made a defendant by order of the court, and supplemental summons issued to bring him in.

Code, § 1588.

Notice of the pendency of the action.

The plaintiff should, at the time of filing his complaint, and may at any time before final judgment, file a notice of the pendency of the action.

What it must state.

Said notice must state all the names of the parties, the nature and object of the action, and a description of the property to be partitioned.

Code, § 1670.

Where filed.

Said notice should be filed in each county where the property lies in regard to which the action is commenced.

Code, § 1670.

If filed before service of summons.

If said notice is filed before service of summons then personal service thereof must be made or publication must be commenced or service made out of the State within sixty days after the same is filed.

Code, § 1670.

The complaint.

The complaint must describe the property with common certainty, and must specify the rights, shares and interest therein of all the parties as far as can be ascertained. And if a party, a share, a right or interest, is unknown to the plaintiff, or if ownership of the inheritance depends upon an executory devise, or if a share or interest is uncertain or contingent, or if the remainder is a contingent remainder so that the party cannot be named, those facts must all be stated in the complaint.

Code, § 1542; *Townsend v. Bogert et al.*, 126 N. Y. 370.

Necessary requirements.

As the proceedings are statutory and in rem, the jurisdiction of the court is therefore confined to the subject

matter as set forth in the complaint, and it is, therefore, necessary to be very careful to follow the exact requirements of the statute.

All facts as to possession must be alleged sufficiently to apprise the court of the exact situation of the parties.

One action for lands in common.

All lands held in common by the same persons must be partitioned in one action.

Henderson v. Henderson, 9 N. Y. St. Rep. 356.

Where infants are parties.

Where infants are parties the complaint should state if the parties own any other lands in common.

General rule 65; Pritchard v. Druth, 32 Hun, 417.

The estate of each must be stated.

But where several own collectively, shares, the extent of which are unknown, that fact may be stated.

Hyatt v. Pugsley, 23 Barb. 285.

And if the interest of each is not stated a purchaser cannot be compelled to complete his purchase.

Noble v. Cromwell, 26 Barb. 475.

Where plaintiff seeks to recover rents and profits, such facts as entitle him thereto must be pleaded.

Bullwinker v. Ryker, 12 Abb. Pr. 311.

One desiring to recover advances made by him on account of the property, such facts must be alleged and judgment asked therefor.

Bogardus v. Parker, 7 How. Pr. 305.

The right to maintain the action should be fully stated.

Wainman v. Hampton, 110 N. Y. 429.

If the property is of such a character that actual partition cannot be had, and a sale is desired, the facts must be alleged and judgment demanded accordingly.

Joinder of actions.

Two or more causes of action as specified in section 484 of Code of Civil Procedure, may be united.

Code, § 1687; Townsend v. Bogert, 126 N. Y. 370.

When plaintiff knows that a person claims an interest but does not know the nature or extent of the claim, he may so state, and call in the claimant and compel him to disclose his interest.

Townsend v. Bogert, 126 N. Y. 370.

Answer.

The title or interest of the plaintiff as stated in the complaint; the title or interest of any defendant as stated in the complaint; and the title or interest of any defendant as stated in his answer, may be controverted by the answer of any defendant. But the defendant testing the title or interest of a co-defendant must state it in his answer, and must, at least twenty days before the trial, serve a copy of his answer upon the attorney of such defendant or upon the defendant personally if he has not appeared by attorney.

Code, §§ 521 and 1543.

Issue tried.

And all issues so joined must be tried in the action.

Code, § 1543.

The title and rights of all parties may be determined.

Shannon v. Pickell, 2 N. Y. St. R. 160.

What must be pleaded.

The rules of pleading apply to the answer in partition, and any statutory defense, if relied on, must be pleaded.

Barnard v. Onderdonk, 11 Abb. N. C. 349.

What determined.

The question of tenancy, joint or common, the entire question of title as between the plaintiff and defendants and the defendants themselves, can all be raised in the answer.

But the question of title as between the plaintiffs themselves cannot be determined, because the plaintiff cannot join with him as plaintiff a person having a conflicting claim.

Struppman v. Muller, 52 How. Pr. 211.

Void devise.

An heir may contest the title of one holding under a devise if he alleges the devise to be void.

Code, § 1537.

But a judgment under section 2653a, Laws 1897, is a bar to the plea that the devise is void.

Code, § 2653a.

Creditor's claim.

The claim of a creditor may be tried and his rights determined.

Code, § 1540.

What adjudicated.

And all questions as to dower, courtesy, liens, life or other estate may be adjudicated in this action.

Code, § 1539.

Under the Code all titles and interests can be now tried and determined.

Code, § 1543.

What cannot be determined.

Where some of the parties are tenants in common of lands in different counties, but are not tenants in common with certain other parties, the questions cannot be determined in one action, as the rights of parties cannot be determined in an action in which they have no interest in common with some of the other parties.

Mayor v. Mayor, 11 Abb. N. C. 367.

If some of the lands are situate in another State but the parties agree to make partition in this State, they will not be allowed to question the jurisdiction of the court.

Bowen v. Durant, 6 N. Y. St. R. 535.

Rents and profits adjusted.

The court may adjust the rights of one or more of the parties by reason of any receipt of more than his or their proper share or proportion of the rents or profits of a share or part of a share.

Code, § 1589.

Accounting.

A party who alleges facts sufficient to entitle him to an accounting of the rents and profits, may recover them, especially where the land is held adversely to him.

McCabe v. McCabe, 18 Hun, 153.

Receiver.

In a proper case the court may appoint a receiver, and under the order of the court may lease the property and collect the rents and profits pendente lite.

Weeks v. Weeks, 106 N. Y. 626.

Improvements.

A tenant in possession who desires to recover for necessary improvements, must demand the same in his pleading.

Wainman v. Hampton, 110 N. Y. 429.

Reply.

The plaintiff should reply to any affirmative matter set up in the answer of one or more of the defendants, and each defendant, whose title is attacked by any other defendant, should answer same.

Issues.

The issues are formed and tried like any other action.

Code, §§ 963 to 981.

Trial by jury.

The issues of fact are triable by a jury, and unless the court directs the issues to be stated as prescribed by section 970 of the Code, they may be tried upon the pleadings.

Code, § 1544; Van Schuyver v. Mulford, 59 N. Y. 426; Weston v. Stoddard, 137 N. Y. 119; Hulse v. Hulse, 17 Civ. Pro. 92; O'Grady v. O'Grady, 55 Hun, 40; Stewart v. Blatchley, 8 Misc. 472; Bell v. Gittere, 30 N. Y. St. R. 221.

Reference.

And where there is no dispute as to the respective rights and interests of the parties, the court may order a reference instead of a jury trial.

Brown v. Brown, 23 N. Y. St. R. 768.

Default.

When a defendant has defaulted or the party is an infant, the court must ascertain the interests of the several parties.

Code, § 1545.

This may be done by reference or by proof before the court.

Id.

And must be done before an interlocutory judgment is rendered.

Id.; *Watson v. Brigham*, 3 How. Pr. 290; *Mingay v. Lackey*, 142 N. Y. 449.

Application to take proof.

And where default is made and any of the defendants are infants or absentees or unknown, the plaintiff, on affidavit and notice to such as have appeared, may apply at a Special Term for an order of reference to take proof of the matters set forth in the complaint and the rights of the parties.

General rule 66.

Such referee shall be selected by the court.

Id.

What must be shown.

Upon such reference the referee must ascertain the rights, shares and interests of all parties; also, if any of the defendants are infants, absentees or unknown; and also of the matters set forth in the complaint; also an abstract of the title by which the same are held; and where the plaintiff has stated that the lands are so situated that partition of them cannot be had without great prejudice, said referee should ascertain and report that fact, and the proof should be certain as to all the facts.

Hamilton v. Morris, 7 Paige, 39; *Larkin v. Mann*, 2 Paige, 27.

Duties of referee.

The duties of the referee should be stated in the order and the matters to be found by him.

General rule 66.

Reference to ascertain liens.

Also before an interlocutory judgment for the sale of the premises can be made the court, with or without application, must ascertain by a reference whether there is any creditor not a party who has any lien on the undivided share or interest of any party.

Code, § 1561; *Hall v. Partridge*, 10 How. Pr. 188.

But said reference may be dispensed with in the discretion of the court if the court is satisfied by a search certified to by the clerk or register of the county where the property is situate that there are no outstanding liens.

Id.; *Leinen v. Elter*, 43 Hun, 252; *Eq. Life Assn. Co. of the U. S. v. Olyphant*, 32 N. Y. St. R. 705.

Notice to lienors.

If a reference is directed said referee must cause a notice to be published once a week for six successive weeks in a newspaper designated by the court in the county where the venue is laid, and also in any other county where the property is situated, directing each party who has such lien to appear before said referee at a specified time and place to prove his lien and the amount due or to become due thereon. And the referee must make his report thereof with all convenient speed.

Code, § 1562; *Halsted v. Halsted*, 55 N. Y. 442; *Connor v. Connor*, 20 Civ. Pro. 308; *O'Grady v. O'Grady*, 56 Hun, 40; *Doremus v. Doremus*, 49 N. Y. St. Rep. 800.

All lienors are bound by the confirmation of the referee's report if due and regular notice has been given.

Dunham v. Minard, 4 Paige, 441.

Report of referee, what to contain.

If the referee should report that actual partition cannot be made, he should state all the facts which are the basis of his conclusions, so that the court may be informed, and should be very particular and explicit in his report as to the title, as the purchaser is entitled to an indefeasible title before he can be compelled to complete his purchase, and the report should state or the search

annexed should show every fact necessary to make the title perfect.

Tucker v. Tucker, 19 Wend. 226.

Interlocutory judgment.

After a trial of the issues as raised by the pleadings, or of the trial by reference or default, an interlocutory judgment will be made in which must be determined the rights, shares or interest of each party as far as has been ascertained, and each must determine the rights of the parties therein.

Code, § 1546.

Judgment to sell.

And where it is found or it appears to the court upon application for judgment in favor of the plaintiff, that the property or any part thereof, cannot be partitioned, such judgment (except as otherwise expressly prescribed, that is where issues are entitled to be tried by a jury), must direct that such property or part thereof be sold at public auction.

Id.

Judgment to partition.

Otherwise, it must be direct that partition be made between the parties according to their respective rights, shares and interest.

Id.; Furman v. Furman, 12 Hun, 441; Brooks v. Davey, 109 N. Y. 495; Spliess v. Meyer, 20 Civ. Pro. 157; Hyatt v. Pugsley, 23 Barb. 285.

Judgment as to part.

Where the rights, shares and interest of a party has been determined, and the rights, shares and interest of the other parties as between themselves has not been determined, such judgment must direct partition as between such party whose share has been determined and the other parties.

Code, § 1547.

And if the rights of two or more have been determined

it may also direct partition among them of a part of the property proportionate to their aggregate shares.

Id.

And the court may, from time to time, as the other interests are ascertained, render judgment in like manner of the remainder of the property.

Id.; *Walker v. Walker*, 3 Abb. N. C. 12.

Thus we see great care should be taken in the preparation of the interlocutory judgment, as it declares the rights, titles and interests of each party, and determines their rights to the property.

Taggart v. Hurlburt, 66 Barb. 553.

The interlocutory judgment determines the question whether the property shall be actually partitioned or sold.

Partial partition.

Where the rights of one or more of the parties have been ascertained, but no determination as to the others, the court may direct the action to be served, and judgment be rendered as to the rights of those determined, and leave the action to proceed as to the others.

Code, § 1547.

Substituted parties plaintiff.

And if the plaintiff's interests have been determined the court may direct that one of the other parties be substituted as parties plaintiff.

Code, § 1547.

This will be done upon proper showing on motion.

Shares in common.

Two or more persons making it appear to the court that they desire to enjoy their shares in common, may have judgment for partition, so as to set-off their shares to them without partition as between them.

Code, § 1548; *Scott v. Guernsey*, 48 N. Y. 106; *Haywood v. Judson*, 4 Barb. 228.

Judgment modified.

The court may from time to time modify the interlocutory judgment or render a supplemental judgment.

Code, § 1560.

Notice of motion and appeal.

The moving party should enter the interlocutory judgment and serve a copy upon the adverse party (with the usual notice of entry). And any person who deems himself aggrieved may appeal to the Appellate Division, but not to the Court of Appeals.

Beebe v. Griffing, 6 N. Y. 465.

Commissioners.

Where the interlocutory judgment directs partition such judgment must designate three disinterested freeholders as commissioners to make such partition.

Code, § 1549.

Report.

Their report is regarded as the verdict of a jury and will not be set aside without good cause.

Powers and duties.

Their powers and duties, their manner of making actual partition and report, is set forth in sections of the Code.

Code, §§ 1550, 1551, 1552, 1553, 1554.

Order on report.

The court may set aside or confirm the report, and may, if necessary, appoint new commissioners who proceed as before.

Code, § 1556.

Final judgment.

Upon confirmation of the report the court must make a final judgment which is binding and conclusive upon the plaintiff, and each defendant who was served personally or by publication, and the legal representatives of each party.

Code, § 1557; Reed v. Reed, 107 N. Y. 545.

Upon whom binding.

Also each party claiming from, through or under such party by title accruing after the filing of the judgment roll or of the *lis pendens*.

Id.; Home Ins. Co. v. Dunham et al., 33 Hun, 415;
Jordan v. Van Epps, 85 N. Y. 427.

The same.

Also, each person not in being when the interlocutory judgment is rendered who, by the happening of any contingency, becomes entitled to a beneficial interest attaching to an estate or an interest in a portion of the property to which the person first entitled was plaintiff or defendant duly served.

Id.; *Bernard v. Onderdonk*, 98 N. Y. 158.

Section 445 not apply.

And section 445 of the Code does not apply to this final judgment so as to permit a defendant served by publication to come in and defend.

Id.

Must direct.

The final judgment must also direct that each party to whom a part is allotted be let into possession.

Code, § 1558.

Costs.

Also costs must be directed to be paid plaintiff.

Code, § 1559.

The Commissioners.

Have nothing to do with the sale of the property.

Code, § 1560.

What lands partitioned.

They can only make the partition ordered by the interlocutory judgment; if they include other lands their proceedings are void, and a final judgment based thereon is void.

Corwhite v. Griffing, 21 Barb. 9; *Vail v. Vail*, 17 Civ. Pro. 38; *Ford v. Knapp*, 102 N. Y. 135.

Notice to partition.

It is not necessary, but the better practice is to give all parties interested in the proceedings notice of the time and place where they will meet to partition.

Doubleday v. Newton, 9 How. Pr. 71.

Duties of commissioners.

Their duties are ministerial, and their actions are limited to the directions contained in the interlocutory judgment, but still they must use their best judgment and

make as fair and equitable division as possible, dividing the property so as to preserve its use, and when the division cannot be equitable require a money payment from one to the other so as to equalize the shares, and the court will not interfere unless it is shown that they have abused or exercised their powers unjustly.

Vail v. Vail, 23 N. Y. St. Rep. 574; Post v. Post, 65 Barb. 192.

When the interlocutory judgment directs that a certain portion be set apart for several who desire to hold in common, they may do so and partition the balance.

Code, § 1548; Scott v. Guernsey, 48 N. Y. 106.

All to meet, majority to act.

All the commissioners must meet together but a majority may act and set forth the fact that they all meet, sign the report and give the reasons why it is not signed by all.

Code, § 1554; Schuyler v. March, 37 Barb. 350; Underhill v. Jackson, 1 Barb. Ch. 73.

Notice of report filed.

After the report is filed either party may serve notice upon the others that said report is filed, and a notice of motion for confirmation, and if the others file no objections within eight days the report will be confirmed; if objections are filed they will be heard in the usual way.

General rule 30.

Upon confirmation.

The report of the commissioners if confirmed, becomes a part of the record title of the property; it should be carefully and accurately made, and give an accurate description of each parcel set off; it should give the nature of the estate if in fee or less than a fee. It should state the items of the expenses of the commissioners and the amount paid for surveys. It should be proved like a deed and filed in the county clerk's office of each county where the property is situate.

Code, §§ 1544 and 1555.

Proceedings to sell.

Where it appears to the court by the report of the referee appointed to ascertain if the property can be partitioned, or on the application of plaintiff for judgment, or on the report of the commissioners that the property cannot be partitioned, then the court will order a sale thereof by a referee or by the sheriff at public auction to the highest bidder.

Whether a sale will be ordered or not depends upon the facts in each case, and a sale is only resorted to when the court is convinced that actual partition cannot be made, therefore, it is necessary that all steps toward a sale be taken with great care, and that all the facts necessitating a sale fully appear.

Facts must be stated.

The commissioners when they report a sale must state all the facts and reasons; conclusions will not answer.

Tucker v. Tucker, 19 Wend. 226.

When infant's interest cannot be sold.

A sale of the interest of an infant or incompetent person cannot be had when said interest is by deed or will directed that it should not be sold.

Code, § 2357.

Such sale is void.

Forman v. Marsh, 11 N. Y. 544.

Where sale not ordered.

Where the effect would be to interfere with the rights or powers of an executor of a will a sale will not be ordered.

Henderson v. Henderson, 113 N. Y. 1.

Judgment to sell.

When the interlocutory judgment directs a sale the court must direct the terms of credit to be given, if any; also direct the terms of credit which may be allowed for any portion of the purchase money which it thinks proper to be invested, and for any portion of the purchase money which is required to be invested for the benefit of infants,

unknown owners, parties out of the State, tenants for life, or years, or by courtesy, or in dower.

Code, §§ 1573, 1581, 1582, 1583.

As to liens.

If it appears that there are any existing liens upon the share or interest of any party, the interlocutory judgment must direct the person making the sale to pay into court the portion of the money arising from the sale of such share or interest after deducting the costs and expenses for which it is liable.

Code, § 1563.

Terms of credit.

The interlocutory judgment for sale must direct the terms of credit which may be allowed for any portion of the purchase money, and direct the investment of that which is necessary.

Code, § 1573.

Report.

The person making the sale must immediately file with the clerk his report under oath, containing a description of each parcel sold, the name of the purchaser and the price for which it was sold.

Code, § 1576.

Confirmation.

If the sale is confirmed final judgment must be entered accordingly, directing the officer making the sale to execute the proper conveyances.

Code, § 1577.

As to costs and expenses.

Code, § 1579.

Sale.

The person making the sale must give notice of the time and place as follows:

First. By posting in three public places where the sale is to take place written or printed notices, and also in the town or city where the property is situated. Said notices must be posted at least forty-two days before the sale.

Second. By causing a copy of the notice to be published in a newspaper in the county where the property is situated, if there is a newspaper published there, and if there is none, then in the official paper at Albany. Said notice must be published for six full weeks (forty-two days) before the day of sale.

Code, § 1434.

Published in the city.

If the property is situated in a city in which a daily paper is published, then such notice may be published twice a week for three successive weeks (twenty-one days) before the sale. But in the city of Greater New York it must be published in two daily papers for such time.

Code, § 1678.

The notice need not state the terms of the sale or the manner.

Hoffman v. Burke, 21 Hun, 580.

The notice must describe the property with common certainty.

Code, § 1435.

Objections filed.

If proper notice has not been given as required by the statute, a party aggrieved thereby may file objection setting forth his grounds to the report, and move to set the same aside.

Postponements.

All postponements of the sale must be published in the same paper or papers of the first notice.

Code, § 1678.

Sale in person.

After the officer has posted his notice and postponements thereof, he must make the sale at the time and place designated in person, and his duties are ministerial, and he must follow strictly the order under which he acts; he cannot vary the terms in any material particular.

People v. Bergen, 53 N. Y. 404.

He is liable for contempt.

Id.

Application to the court.

If he thinks it would be more advantageous to act differently he must apply to the court, and he is at liberty to ask the court for instructions if he is in doubt.

Easton v. Pickersgill, 55 N. Y. 310.

Premises sold subject to a mortgage.

If the premises are ordered sold subject to a mortgage, the referee cannot ascertain the amount thereof and pay it; he must sell it subject thereto.

Bache v. Doscher, 67 N. Y. 429.

Referee cannot delegate his power.

He cannot delegate his powers to another or allow or suffer anyone to sell or receive or dispose of the money.

Van Tassel v. Van Tassel, 31 Barb. 439.

Adjournment.

He has power to adjourn the sale from time to time.

King v. Platt, 37 N. Y. 155.

How sold.

The sale must be at public auction to the highest bidder. The terms must be made known, and if sold subject to any claim; and if the property consists of two or more distinct parcels, they shall be sold separately, unless otherwise ordered, but if two or more buildings are situated on the same city lot they shall be sold together.

Code, § 1678.

How and where sold in cities.

Such sales in the cities of New York or Brooklyn shall be held between 12 M. and 3 o'clock P. M., unless otherwise specially directed, and such sale in the city of New York shall take place at the Exchange sales rooms at 111 Broadway, but the Appellate Division of the Supreme Court, First Department, may change such place and may designate the auctioneers or persons who shall make the said sales. Such sales in the city of Buffalo shall take place at the Real Estate Exchange rooms, between 9 and 11 A. M., and 2 and 3 P. M., unless the court ordering the sale shall otherwise direct; such sales are subject to such

regulations as the Justices of the Eighth District shall establish.

General rule 62.

Sold in parcels.

If the judgment directs the property to be sold in parcels and the referee sells in gross, the sale is irregular and voidable, and can be set aside if moved against in time, but if no motion is made the sale will be considered acquiesced in.

Cunningham v. Cassidy, 17 N. Y. 276.

Statute of frauds.

The officer selling acts as an officer of the court, and no memorandum of sale is needed to be signed by both parties to avoid the statute of frauds.

Andrews v. O'Mahoney, 112 N. Y. 567.

Contract of sale.

But it is better to have a contract of sale drawn up and signed by both the officer and purchaser, although the statute only requires the referee's report to contain a description of each parcel sold, the name of the purchaser and the price for which it was sold.

Code, § 1576.

When stayed.

The sale cannot be stayed by a judge out of court except upon at least a two days' notice to the plaintiff's attorney.

General rule 67.

Postponements must be published.

If the officer fails to publish the notice of postponement, the sale is irregular, but if no objection is made it is not void.

Bechstein v. Schultz, 45 Hun, 191.

By what sheriff.

If the sale is to be by the sheriff it must be by the sheriff in office at the time the notice is published, even if his term of office has expired.

Code, § 184, subd. 4; Union Dime Savings Institute v. Andariese, 19 Hun, 310.

PARTITION.

Who cannot purchase.

A commissioner or officer making the sale or a guardian of an infant to the action, cannot purchase nor any person for their benefit, except that a guardian may, if authorized, purchase for the benefit of his ward.

Code, § 1679.

A trustee cannot purchase if it in any way affects his trust, except for the benefit of his cestui que trust.

Fulton v. Whitney, 66 N. Y. 548.

Papers filed nunc pro tunc.

If the plaintiff fails to file any necessary papers the court may allow them filed nunc pro tunc.

Croghan et al. v. Livingston et al., 17 N. Y. 218; Noble v. Cromwell, 26 Barb. 475.

When a purchaser need not complete his purchase.

Stephens v. Humphreys, 73 Hun, 199; id., 141 N. Y. 586.

Taxes.

The person selling must pay the taxes and assessments unless otherwise directed.

Code, § 1676

As to when a resale will be ordered.

Lefevre v. Laraway, 22 Barb. 167.

Report of sale.

Immediately after completing the sale the officers making it must file with the clerk his report.

Code, § 1576.

The report must be specific and show that the officer has carried out and followed the requirements of the statute and the directions of the court, and where the interlocutory judgment has required him to pay certain of the proceeds into court (Code, § 1563), or to the husband after the release by the wife of her inchoate right by dower (Code, § 1571), or to deposit them for the benefit of unknown defendants (Code, § 1572), or to invest any portion of the purchase money (Code, § 1573), or to take securities for portions thereof (Code, § 1575), his report should show all such directions have been followed.

Code, §§ 1563, 1571, 1572, 1573, 1575.

Exceptions to the report.

Anyone aggrieved by the report may file exceptions thereto within eight days after he receives notice that the same is filed.

General rule 30.

Resale.

It is entirely within the discretion of the court to confirm or set aside the sale and order a resale, even if there is no fraud and the sale is in all respects regular.

Hale v. Clauson, 60 N. Y. 339.

The above states the rule in full, and leaves the court with the fullest and broadest power; all purchasers buy subject to the jurisdiction of the court, and his title is not complete till entry of final judgment.

Cazet v. Hubbell, 36 N. Y. 677.

Who can apply.

The application to set aside the sale may be made by any person who is interested in the proceeds of the sale or whose rights are affected by the sale.

Gould v. Mortimer, 26 How. Pr. 167; Goodell v. Harrington, 76 N. Y. 547.

And the remedy is by motion.

McCotter v. Jay, 30 N. Y. 80.

Fraud in the sale.

Where there is an actual fraud in the sale a party injured thereby has a legal right to have the sale set aside, and a refusal to set aside the same by the court may be reviewed in the Court of Appeals.

Fisher v. Hersey, 78 N. Y. 387.

Purchaser's rights.

The purchaser at a judicial sale submits himself to the jurisdiction of the court, and is therefore bound by its reasonable orders. But where he is not a party to the suit his rights will be protected by the court in anything except his own acts or neglect.

Causes to relieve purchasers.

The causes which are sufficient to relieve purchasers from completing his purchase depend upon the circum-

stances of each case. It is sufficient to state for the purpose of this work that he is entitled to a good title free from reasonable doubt, and marketable. Where fraud has entered into the sale, if he can show that he has been injured the court will relieve him from his purchase.

Fisher v. Hersey, 17 Hun, 370.

Purchaser's title.

His title is good as against all the parties to the action or any one claiming under or through a party by title accruing since the filing of the *lis pendens*.

Brooks v. Ackerly, 16 N. Y. St. R. 656.

Possession.

He is not bound to complete his purchase unless he can be put into possession.

Kapp v. Kapp, 15 N. Y. St. R. 967.

Costs.

The costs are regulated by the same rules as in other actions, except as follows:

The prevailing party is entitled to costs, of course, only when title has been put in issue, and each of the several defendants are only liable for his proportionate share of such costs.

The fees and expenses of the commissioners, including surveys, must be taxed under direction of the court, and paid by plaintiff and put into his costs.

Code, § 1555.

Fees.

The commissioners and surveyors are each entitled to five dollars per day, and each of the surveyors' assistants two dollars per day.

Code, § 3299.

And the final judgment must also state that each defendant pay to the plaintiff his proportion of the plaintiff's costs, including the extra allowance, and each sum must be fixed by the court.

Code, § 1559.

Extra allowance.

The court may, where a defense has been interposed, award an extra allowance not exceeding five per cent upon the sum recovered or value of the subject matter.

Code, § 3253.

All costs and expenses must be deducted from the proceeds of the sale, and each parties' costs paid to his attorney.

Code, § 1579.

Distribution.

The proceeds, after deducting costs and charges, are awarded to the parties in proportion to their rights and interest. And all liens must be paid out of the property upon which it is a charge.

Code, § 1580.

Jurisdiction of the fund.

The court has jurisdiction of the fund, and adjudges how distribution shall be made upon the coming in of the referee's report.

Halstead v. Halstead, 55 N. Y. 442.

Title to fund; how decided.

Disputes as to the title of the funds must be settled by action and not by an order of the court.

Matter of Castle, 2 N. Y. St. R. 362.

Rents and profits.

As to rents and profits received by any of the parties the court may adjust.

Code, § 1589.

The court, by the final judgment, directs the application of the proceeds.

Code, § 1577.

Dower in the property.

Where there is a dower in the entire property directed to be sold, the court must consider and determine at the time of the interlocutory judgment for sale is made, whether said right should be excepted or sold.

Code, § 1567.

Sale directed, including dower, etc.

If a sale of the property, including the right of dower or any other interest therein, is directed, the purchaser takes the property free, and the court must direct that sufficient of the moneys be invested to equal such right, unless the written consent of the party entitled thereto duly executed be filed at or before the report of sale consenting to release the same or to accept a gross sum in lieu thereof.

Code, §§ 1568, 1569, 1570, 1571.

Inchoate right of dower.

The judgment should provide for ascertaining the value of an inchoate right of dower.

Jordon v. Van Epps, 85 N. Y. 427.

Final judgment.

Upon the report of the commissioners appointed to make actual partition, or upon the report of the referee appointed to sell, the court must make an order confirming or refusing to confirm the same.

Code, §§ 1557 and 1577.

Upon the court confirming the same, final judgment must be entered that said partition or sale shall be firm and effectual forever.

Code, §§ 1557 and 1577.

Also, in case of sale directing the person making the sale to execute the proper conveyances.

Code, § 1577.

On a question of the rents and profits in case of default the relief can only be that demanded in the complaint.

Bullwinker v. Ryker, 12 Abb. Pr. 311.

All rights of the parties should be determined.

The final judgment should settle all the rights of the parties and not leave a portion of the property to be subject to any other proceeding in partition.

Post v. Post, 65 Barb. 192.

Upon whom the final judgment is binding.

Said final judgment, either for sale or partition, is binding upon the following parties:

First. The plaintiff and each of the defendants upon whom service was made, and their legal representatives. And section 445 of the Code, as to defending after final judgment, does not apply.

Second. Each person claiming from, through or under the plaintiff or defendants, as above, who have acquired a title after the filing of the judgment roll or of a notice of the pendency of the action.

Third. Every person not in being when the interlocutory judgment was made who have acquired any beneficial interest or estate through such plaintiff or defendants.

Code, § 1557; *Mead v. Mitchell*, 17 N. Y. 210; *Weston v. Stoddard*, 137 N. Y. 126; *Chism v. Keith*, 1 Hun, 589; *Prior v. Prior*, 15 Civ. Pro. 436.

It is also a bar to all parties who are not parties who have a lien but who had notice to make proof of their claim before the referee.

Code, § 1578.

On whom the final judgment is not binding.

But it is not binding upon a party whose rights or interest are expressly reserved and left unaffected, and upon parties who have not been made parties to the action or any party claiming through or under them.

Code, § 1557.

But if the plaintiff elected to make them parties then the judgment must direct and award them their rights, and it would then be binding.

Mead v. Jenkins, 27 Hun, 570.

To whom it is a bar.

It is also a bar against each person not a party who has, at the time it is rendered, a general lien by judgment or decree on the undivided share or interest of a party, if notice was given to appear before the referee and make proof of his claim or lien as prescribed in section 1562, and also against each person made a party who has such lien.

Code, § 1678.

But if such persons having such lien had the same on record at the time of the commencement of the action or of the filing of the notice of pendency who is not made a party, the judgment does not affect them.

Code, § 1678.

Infant's bound.

Infants who have properly appeared by guardian are equally bound.

Prior v. Prior, 49 Hun, 502.

Actual partition or sale bars the future contingent interests of persons not in being.

Mead v. Mitchell, 17 N. Y. 210.

The future rights of a remainderman under a will are not barred.

Monarque v. Monarque, 80 N. Y. 320.

Security to refund.

Also the judgment may direct that any party who receives his portion of the proceeds give security to refund.

Code, §§ 1584, 1585, 1586.

Recording copies of judgment roll.

An exemplified copy of the judgment roll or of the final judgment should be recorded in each and every county where the property or any part lies.

Code, §§ 1595 and 1677.

Possession.

The judgment must direct that a party be let into possession, and if any person bound by the judgment withholds the same he is guilty of contempt, and the court can order the sheriff to put the party into possession.

Code, § 1675.

The power of the court only extends to the persons who have been parties to the action, and other parties who claim to hold rightfully have the right to have their claims adjudicated.

Meiggs v. Willis, 8 Civ. Pro. R. 125; Bryton v. Jackson, 10 Paige, 307.

Appeals.

An interlocutory judgment can be appealed only to the Appellate Division, not to the Court of Appeals.

Tompkins v. Hyatt, 19 N. Y. 534.

But an appeal from a final judgment may be taken to the Court of Appeals.

Code, § 190.

Appeal from an interlocutory judgment.

And when final judgment has been rendered after the decision of the Appellate Division upon an appeal from the interlocutory judgment, an appeal may be taken directly to the Court of Appeals from such final judgment, and such appeal brings up for review the decision of the Appellate Court upon the interlocutory judgment.

Code, § 1336.

The decision of the court being largely one of discretion, it will not be disturbed unless error is clear.

Scott v. Guernsey, 48 N. Y. 106.

Appeal dismissed.

The appeal will be dismissed where one accepts his portion after he has appealed.

Alexander v. Alexander, 104 N. Y. 643.

The practice on appeal is the same as in other cases.

PRECEDENTS.

Affidavit for Order of Publication.

(See text, page 63.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

STATE OF NEW YORK, }
County of Fulton, } ss.:

, being duly sworn, says that the above-entitled action is brought for the partition of real property situate in the county of Fulton and State of New York, of which real property the plaintiff and defendants are owners in common, and owners of an undivided portion of said premises; that , defendants, are not residents of the State of New York, and reside at No. street, in the city of Chicago, Ill.; and the defendants, , reside at Seattle, State of Washington, and that they cannot be found within the State of New York, to the knowledge and belief of deponent; that the summons and complaint in the above-entitled action were filed in the office of the clerk of the county of Fulton on the day of , 189 ; and that a copy of the same is hereto annexed and made a part of this affidavit; that the statements contained in the verified complaint are true to the knowledge of this deponent; and that this deponent's source and knowledge of the non-residents of the defendants named herein, and of their residence at the places named above, are as follows; that deponent has received letters from said persons, and that each of the said defendants stated that they were now residing at the places stated above (or state any matter purporting to the same).

Deponent further says that he will not be able to make personal service of the summons and complaint on the defendants herein, within the State of New York, for the reasons that said defendants reside without the State, as above set forth; that the said defendants have property herein, to wit, an undivided interest in the property described in the complaint herein.

Sworn to before me this

day of , 189 .

E. J. O'C.,

Notary Public,

Fulton County.

Order for Publication.

(See text, page 63.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

It appearing to me upon the verified complaint in this action, showing that the cause of the action for a judgment is therein demanded against the defendants namely (here name the defendants); and upon the affidavit of , the plaintiff, verified on the day of , 189 ; and it appearing to me satisfactorily that the defendants are non-residents of the State of New York, and that personal service cannot be made therein; now, on motion of Clarence W. Smith, attorney for the plaintiff in the above-entitled action, it is

Ordered, That the service of the summons and complaint in the above-entitled action be served upon the defendants by publication, viz., by the publication thereof in two newspapers, to wit, the Johnstown Daily Republican, published at Johnstown, N. Y., and the Johnstown

Daily Democrat, published at the same place; said publication to be made once a week for six successive weeks, or at the option of the plaintiff, by the service of the summons and a copy of the complaint and a copy of this order, and notice of the object of action herein, upon said defendants personally without the State; and it is further

Ordered and directed, That before the first publication the plaintiff deposit in the post-office in the city of Johnstown, N. Y., in a securely post-paid wrapper, copies of the summons and complaint herein annexed, and of this order, directed to the several defendants at their respective places of residence, to wit (insert the residence of the said defendants).

Dated day of , 189 .

M. L. S.,
J. S. C.

Enter in Fulton.

(Note.—The summons must have the usual notice for publication, which is as follows:

To , defendants, the foregoing summons is served upon you by publication pursuant to an order of the Hon. M. L. S., Justice of the Supreme Court of the State of New York, dated the day of , 189 , and filed with the application in the office of the county of Fulton. The object of this action is to make partition according to the respective rights of the parties, and if it is made by proof that partition cannot be made, without great prejudice to the owners therein, then for a sale as described in the complaint.

Dated this day of , 189 .

..... Sig.)
.....

Plaintiff's Attorney.

Lis Pendens.

(See text, page 58.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Notice is hereby given that an action has been commenced in this court upon the complaint of the above-named plaintiff against the above-named defendants, for the purpose of obtaining partition and division of the premises described in said complaint, among the different owners thereof, and persons entitled thereto; and in case partition cannot be had, then a sale thereof under the directions and order of this court, and for the division of the proceeds of such sale, among said parties as are entitled thereto, according to their respective rights in said premises; and which said premises were, at the time of filing this notice, situate in the county of Fulton and State of New York, bounded and described as follows, to wit: (Description.)

Dated at , this day of , 189 .

C. W. S.,

Attorney for Plaintiff.

Office and post-office address,

.....

To Charles H. Butler, County Clerk, Fulton County:

Sir.— You are hereby directed to index the foregoing notices to the names of , defendants in the above-entitled action.

C. W. S.,

Plaintiff's Attorney,

.....

Complaint Setting Out Void Devise.

(See text, pages 55, 61.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

The plaintiff complains of the above-named defendants, and alleges as follows:

First. That on or about the day of , 189 , one , being the owner in fee simple of certain real property situated in the county of Fulton and State of New York, bounded and described as follows, to wit: (Description), died, leaving as his only heirs and next of kin the following named parties. (Here name the parties plaintiff and defendant.)

Second. That the said did, prior to his death, make and execute his last will and testament, in and by which was devised and bequeathed his entire real property, and also personal property, which said real property is the same as hereinbefore described; to the defendants, the above-named , and (here name the defendants), which said will is as follows, to wit: (Here set forth the will verbatim.)

Third. That on the day of , 189 , the said last will and testament was duly presented to the surrogate of the county of Fulton and State of New York; and due notices issued to all of the parties interested therein, stating that the said will would be offered to the said surrogate for probate.

Fourth. Plaintiff further alleges that said paper so purporting to be the last will and testament of , deceased, is not in fact the last will and testament of the said , deceased; that the same was never subscribed and executed by him; and is not his own free act or deed, and conveys no right, title or interest in and to the said property herein described; and that the pre-

tended signature thereto is not his act or deed, and was never acknowledged nor in no wise attested by him, and that said pretended will and paper is void and of no effect.

Fifth. Plaintiff further alleges that the defendant (here state the exact rights, shares, interests of each of the parties to this action).

Sixth. Plaintiff further alleges that _____ is the wife of _____, defendant (here set out in full the inchoate right of dower of each of the rights of said defendants, and also the tenants by courtesy of each of the husbands of the defendants).

Seventh. Plaintiff further alleges, upon information and belief, that the personal property of the said _____, deceased, at the time of his death, will not and is not sufficient to pay and discharge his debts in full; and the said debts remain unpaid, and will be a charge and lien herein upon the property described.

Wherefore, plaintiff demands judgment:

First. That the property devised to the said _____, contained in the paper purporting to be the last will and testament of _____, deceased, be declared null and void, and the instrument be adjudged not to be the last will and testament of the said _____, deceased.

Second. That a partition and division be made of said premises according to the respective rights of said parties, or if partition cannot be had without material injury to these parties, then for a sale of said premises, and a division of the proceeds between the parties, according to their respective rights.

Third. That this court ascertain and determine the amount of the debts of said _____, deceased, which are a charge and will become a lien upon said real property; and that said debts be paid by the referee out of the

proceeds of said sale of said real property, next after the payment of the costs and expenses of this action.

CLARENCE W. SMITH,

Attorney for,

Guardian ad litem of, an infant.

Office and post-office address,

Johnstown, N. Y.

(Verification.)

Complaint in Partition Setting up Title.

(See text, pages 57, 58.)

SUPREME COURT — COUNTY OF FULTON.

AMOS D. SHELDON, Plaintiff, against ALDERBERT E. BLEEKMAN, ALICE W. BLEEKMAN, His Wife; HERBERT E. BLEEKMAN and MARY M. BLEEKMAN, His Wife, et al., Defendants.
--

The complaint of the above-named plaintiff respectfully shows, upon information and belief:

First. That Eber Jacobs, of the town of _____, in the county of Fulton and State of New York, was, in his lifetime, seized in fee simple of the following described premises, to wit: (Description); also, that other tract, piece or parcel of land situate in the town, county and State aforesaid, bounded and described as follows, to wit: (Description.)

Second. That the said Eber Jacobs, being so seized of the above-described property did, on the _____ day of _____, 189____, die intestate, leaving the above-named plaintiff and the above-named defendants his only surviving heirs-at-law.

Third. That by the death of the said Eber Jacobs, the plaintiff and defendants herein became seized of and entitled to the possession of the said described property, as tenants in common, by descent from the said Eber Jacobs, of the following rights, shares and interest therein, to wit: That the plaintiff Amos D. Sheldon, is the son of Irene Sheldon, deceased, who was a sister of the said Eber Jacobs, deceased, and is entitled to one undivided part thereof; that the defendants Alderbert E. Bleekman and Herbert E. Bleekman were children of Amanda Bleekman, deceased, a sister of the said Eber Jacobs, deceased, and as such are entitled to one undivided part thereof. (So continue as to the rights, shares and interest of the defendants.)

Fourth. That the defendant Alice W. Bleekman, is the wife of the defendant Alderbert E. Bleekman (so continue with the wife of all the defendants), and each have an inchoate right of dower of the respective shares of their respective husbands, the defendants aforesaid.

Fifth. That the share, right and interest of the said John Bleekman is unknown to the plaintiff, and cannot be ascertained after due diligence and search.

Sixth. That the parties hereto own no other lands in the State of New York in common.

Wherefore, the plaintiff prays that a partition may be made among the parties hereto according to the respective rights and interest therein; that commissioners may be appointed by the court for the purpose of making such partition, and in case the partition of such premises, or any part thereof, cannot be made without great prejudice to the owners thereof, then, that the said premises, or such part thereof as cannot be divided, may be sold by and under the direction of this court, and that the proceeds of the sale, after paying the costs and expenses of this suit, may be divided among the owners thereof, according to

their respective rights and interest therein; and that the plaintiff may have such other and further relief as may be just and proper.

H. D.,
Attorney for Plaintiff,
(Verification.) Johnstown, N. Y.

Complaint by Assignee in Partition.

(See text, page 55.)

SUPREME COURT — FULTON COUNTY.

BYRON D. BROWN, as Assignee of BALTIE H. DIXON and GEORGE E. WILKINS, for the Benefit of Creditors, against WALTER W. DIXON et al.

The plaintiff complains of the defendants, and alleges:

First. That on the day of , 189 , he was duly made assignee by an instrument in writing, which was duly executed and filed in the office of the clerk of the county of Fulton, of all the goods, chattels, property and interests of George E. Wilkins and Baltie H. Dixon; and that as such assignee he duly qualified as such, and filed a schedule, and did in all things, as required by law, fully comply with the statutes, giving him the right, title and interest in and to all property, both real and personal, that belonged to the said Dixon and Wilkins' assignors.

Second. That as such assignee, he, together with the other defendants herein, became seized and possessed as tenants in common of the following described property, to wit: (Description); and as such tenants in common they are entitled to the following rights, shares and interests of said described property, that is to say, that the

said plaintiff, as such assignee, is entitled to one undivided part thereof, and as such defendant Walter W. Dixon is entitled to one undivided part thereof (and as to the interest of each of the defendants, here state).

Third. That _____ is the wife of Baltie H. Dixon, and _____ is the wife of George E. Wilkins; and that _____ is the wife of Walter W. Dixon; and that each of them have an inchoate right of dower of the respective shares of their respective husbands; that the parties hereto own no other lands in common in this State.

Wherefore, the plaintiff prays that a partition may be made among the parties hereto according to the respective rights and interest therein, that commissioners may be appointed by the court for the purpose of making such partition; and in case the partition of such premises, or any part thereof, cannot be made without great prejudice to the owners thereof, then, that the said premises or such part thereof as cannot be divided may be sold, by and under the direction of this court; and that the proceeds of the sale, after paying the costs and expenses of this suit, may be divided among the owners thereof according to their respective rights and interest therein; and that the plaintiff may have such other and further relief as may be just and proper.

H. D.,

Plaintiff's Attorney,

Johnstown, N. Y.

Affidavit for Leave for Infant to Bring Suit.

(See text, page 55.)

STATE OF NEW YORK, {
County of Fulton, { ss. :

Henry Wright and William Jones, both of the city of Johnstown, N. Y., being severally duly sworn, say and

each for himself says that William Jones is an infant, of the age of seventeen years, and that Henry Wright is the general guardian of the person and estate of the said William Jones; that the said William Jones is the owner as tenant in common with Samuel Jones et al. of all the following described lands, to wit: (Description); that as deponents are informed a suit is necessary to be instituted by said infant for the partition of said property, and the grounds of deponents' information and belief are as follows: That said property is worth about \$10,000, and that the taxes and expenses thereof amount to \$400 annually, and that the gross income thereof does not exceed \$100, and that it is a constant expense to said infant, and he derives no income or benefit therefrom.

Deponents further say that the said Samuel Jones and other tenants in common with said infant, are unwilling to divide said land or make amicable division thereof, although deponent, Henry Wright, as guardian, has requested them so to do, and deponents are satisfied that no friendly division can be made by this infant or in his behalf. Deponents further say that no other or previous application has been made by this infant, or in his behalf, and that no action or proceedings touching said real estate are now pending.

HENRY WRIGHT.
WILLIAM JONES.

(Jurat.)

Application for a Leave to Bring Partition by an Infant.

(See text, page 55.)

STATE OF NEW YORK, }
County of Fulton, } ss.:

, of , being duly sworn, says that he is (describe the affiant); that , who is an infant of the age of years, is the owner and

joint tenant (or as tenant in common); that _____ is equally entitled to certain real estate situate in the county of Fulton, described as follows, to wit: (Description.)

That, in the opinion of the deponent, a suit should be authorized to be brought by said infant for the partition of said property, or the sale thereof, if partition cannot be had, and that the following are deponent's reasons for such opinion: (Here state facts that are for the infant's interest or benefit in said action.)

(Jurat.) _____

Order on the Same.

(See text, page 55.)

At a term of the Surrogate's Court held at the Surrogate's office in the city of Johnstown, in and for the county of Fulton, on the _____ day of _____, 189 .

Present — Hon. J. K., Surrogate.

(Title of the cause.)

I, J. K., Surrogate of Fulton county, being satisfied by the affidavit of _____, dated _____, 189 , that _____, who is an infant of the age of _____ years, is the owner of the equal undivided _____ of the real estate described in said affidavit, situate in the county of Fulton, as joint tenant (or tenant in common); that and that the interest of said infant will be promoted by his bringing an action for a partition of said property. I do hereby authorize said _____ to bring said action.

Dated _____, 189 .

J. K.,
Surrogate.

Guardian's Bond, on Leave to Bring an Action in Place of Infant.

Know all men by these presents that we, _____, and _____, both of the city of Johnstown, county of Fulton and State of New York, are held and firmly bound unto the people of the State of New York in the penal sum of _____ dollars (\$ _____), for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators or assigns, jointly and severally, and firmly by these presents.

Sealed and delivered this _____ day of _____, 189 ____.

Whereas, by an order made by the Supreme Court of the State of New York, at a Special Term thereof, held at the Court House in the city of Johnstown, N. Y., on the _____ day of _____, 189 ____, (or whereas the surrogate of the county of Fulton has given the authority and right to bring the action herein), the said _____ was duly appointed guardian ad litem of the said _____, an infant defendant under the age of _____ years; and that the action in partition is brought by the said _____ as plaintiff against _____ and _____, as defendants, whereby the said order appointing the said guardian required him to enter into a bond with sufficient sureties; now, therefore, the condition of this bond is such that if the said _____, as such guardian, shall faithfully discharge the trust committed to him, and render a just and true account of his proceedings, and doings thereof, then this obligation shall be void, otherwise to remain in full force and virtue.

..... Seal.

..... Seal.

..... Seal.

(Acknowledgment and justification.)

Affidavit for Order of Reference.

(See text, page 63.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

STATE OF NEW YORK, }
County of Fulton, } ss. :

Clarence W. Smith, being duly sworn, says that he is an attorney-at-law residing at Johnstown, Fulton county, N. Y., and is the attorney for the plaintiffs in the above-entitled action; and that said action was commenced by the service of a summons and complaint, the object of which is to obtain a partition of certain real property described in said complaint; and that if partition cannot be had, then for a sale, and a division of the proceeds among the owners thereof according to their respective rights, shares and interest; that said summons and complaint were duly and personally served upon all of the defendants herein (without the State by publication pursuant to the order granted therein by the Hon. M. L. S., Justice of the Supreme Court), within the State, and that more than twenty days has elapsed since said service; and that a copy of said summons and complaint and order of publication were duly served upon and , the defendants; and that twenty days has elapsed since the date of the last publication; that said , defendant, has appeared by his respective attorney, , but that the time to answer has expired, and that no answer or demurrer has been interposed by any of the said defendants; and that , defendant, is an infant, and has been duly appointed his guardian ad litem by an order duly granted by this court; that the notices of the lis pendens in the above-entitled action was duly filed in the office of the clerk of the county of Fulton on

the day of , 189 , and duly indexed to the names of the said defendants more than twenty days since.

CLARENCE W. SMITH,
Attorney for Plaintiff.

Sworn to before me this
day of , 189 .

EMMA J. O'CONNOR,
Notary Public,
Fulton County.

Notice for Reference.

(See text, page 63.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Sir.— You will please take notice that upon the summons and complaint and due proof of service thereof on the defendants herein, and upon the verified affidavit of Clarence W. Smith, duly verified on the day of , 189 , a copy of which is herewith served upon you; and upon the papers and proceedings had in the above-entitled action, I will move this court, at a Special Term thereof to be held at the chambers of the Hon. M. L. S., Justice of the Supreme Court, in the city of Amsterdam, N. Y., on the day of , 189 , for an order appointing a referee to inquire into and take proof of the rights, shares and interest of the parties to this action, in and to said property sought to be partitioned; and report with all due speed whether in his judgment the said property or any part thereof is so circumstanced; that a partition thereof cannot be made without great

prejudice to the parties therein, and for such other and further relief as to the court seems just and proper.

Yours, etc.,

CLARENCE W. SMITH,

Attorney for Plaintiff.

Office and post-office address,

.....

To , Defendant's Attorney.

Order for Reference.

(See text, pages 63, 64.)

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the city of Johnstown, N. Y., on the day of , 189 .

Present — Hon. Leslie W. Russell, Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

On reading and filing the proof of the personal service of the summons and complaint in this action upon the defendants , and upon filing the proof of service of the summons and complaint and order upon the following named defendants , and by publication pursuant to an order made by the Hon. M. L. S., Justice of the Supreme Court; and it further appearing that the notice of the pendency of this action was duly filed in the office of the clerk of the county of Fulton, and upon reading and filing the affidavit of Clarence W. Smith, attorney for the plaintiff, verified on the day of , 189 , wherein it appears to the court that none of the said defendants have appeared, except the defendants , who were infants, who duly appeared by their guardian , and inter-

posed the usual general answer on behalf of the said infants, not denying any material allegations in said complaint, and upon reading and filing proof of service and due notice of this motion upon _____, attorney for said guardian, and after hearing C. W. S., of counsel for the plaintiff, it is ordered that _____, a counselor-at-law, of the city of Johnstown, Fulton county, N. Y., be and he hereby is appointed referee in the above-entitled action, to ascertain and report the rights, shares and interest of the several parties to this action, in and to the property described in the complaint; and also to ascertain if any of the defendants are infants, absentees or unknown; and also to ascertain the titles by which each share, right and interest is held; and to take proof of the plaintiff's title and interest; and to report whether the land so situated could be partitioned, and if it cannot be done without great prejudice to the parties therein; and if he come to the conclusion that partition cannot be made, whether it should be sold; and then, in that case, said referee is further ordered and directed to report whether or not any part thereof is necessary to be sold; and he is further ordered and directed to ascertain whether any creditors who are not parties to this action, have a lien upon said premises, or any share, right or interest of the parties herein, and to report to this court such liens, and the names of the parties and amounts of such liens, the date thereof, and the amount due and to become due.

Enter in Fulton county.

L. W. R.,
J. S. C.

(NOTE.—The order to report as to liens may be dispensed with if a search is furnished satisfactory to the court.)

See text, page 64.

Report of Referee as to the Rights, etc.

(See text, pages 64, 65.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To the Supreme Court of the State of New York:

In pursuance of the order of this court, made in the above-entitled action, on the day of , 189 , by which it was referred to the undersigned referee, to hear and determine the facts made by the pleadings therein, and to take proof of the rights, shares and interest of the respective parties in the said premises, with an abstract of the conveyance by which the rights, shares and interest are held; also to inquire and report if said premises in whole or in part are so situated that an actual partition thereof can be made without great prejudice to the owners; and that if the partition cannot be made then so report; and that if a sale of the whole or a part thereof is necessary, to so report and specify the same, together with the reasons which render said sale necessary; and also to ascertain and report whether any creditors who were not parties to the action, have a specific lien upon said property, or any interest, share or right of any of the parties in said premises, which would necessarily be sold; and also to ascertain and report if any of the defendants are infants, absentees or unknown. Therefore, I, the undersigned referee in said order named, do respectfully report as follows: That I have been attended by the several attorneys who have appeared in this action, and after having taken the oath and qualified as said referee, I proceeded to take proof of the several matters submitted to me; and that I caused the papers, titles and search to be certified by the clerk of the county of Fulton and State of New York, in and by which it appears that there is no general or specific lien or incumbrance on the whole of said premises, or upon any undivided share thereof; and

I further report that I have taken proof, and that there is no general specific lien or incumbrance held by any party on the whole of said premises or upon any share, right or interest therein; and I do further report, that the material facts and allegations in the complaint of the plaintiff are true; and that the rights, shares and interest in the premises described in said complaint are held by (set forth the names of the parties to the action, and by what title they hold; and also the amount of their interest in the premises so described). I do further report that , defendant, is the widow of , deceased, and has a right of dower in the whole of said premises, as said widow; and I do further report that , wife of the defendant , has an inchoate right of dower in said premises, or in said undivided share of said premises; and I do further report that said defendant , as the widow of , deceased, who has the right of dower to the whole of said premises, is of the age of years; and that said dower interest should be sold for the reasons that, to except said dower interest in a sale would seriously impair the salable value of the whole of said property; and I find that she is willing to accept out of the proceeds a gross sum in lieu of said dower interest; and I do further report that the premises described in said complaint are so circumstanced that the actual partition thereof cannot be made without great prejudice to the owners thereof, for the reason that there are a large number of parties in interest, and that a partition would be difficult; and I do further report that the property so situated is valuable farming lands, with farm buildings thereon, and it cannot be divided without greatly impairing its value; and furthermore, there can be no equal proportionate partition therein; therefore, I am of the opinion that a sale of the whole premises would be to the best interest of the parties herein; and I do further report that there are no other parties infants,

absentees or unknown, other than as are herein set forth, and made parties to this action; all of which is respectfully submitted.

HARWOOD DUDLEY,
Referee.

(NOTE.— In a referee's report for actual partition, continue in the same language as the preceding report, except that in my opinion the premises described in the said complaint are so circumstanced that a sale thereof cannot be made without great prejudice to the owners thereof; and that a partition of said premises would be the most advantageous to said owners, for the reasons that the said property consists of business blocks, village lots, etc., which could not be divided without greatly prejudicing the parties thereto, and that the property could not, in my judgment, be sold on a fair and equal basis, but can be partitioned.

Interlocutory Judgment to Partition.

(See text, pages 65, 66.)

At a Special Term of the Supreme Court of the
State of New York, held in the chambers of the
Hon. M. L. S., on the day of ,
189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

On reading and filing the report of , Esq.,
the referee appointed in the above-entitled action by an
order of this court made and entered on the day of
 , 189 ; and on reading and filing proof of due service
of this motion upon , Esq., attorney for the
defendants, and also upon , Esq., attorney for

, defendant, as guardian ad litem of , infants, and upon the pleadings and papers in this action; now, on motion of C. W. S., attorney for the plaintiff, it is

Ordered, adjudged and decreed that the respective rights, shares and interests of the parties to this suit, and of the property mentioned and described in the complaint herein are as follows, to wit: That is the widow of , deceased, and is entitled to her right of dower in and to all of the following described property: (Description); that , plaintiff, is seized of and entitled to in fee simple to one undivided part thereof, subject to said dower right of the defendant ; that the defendant is entitled to in fee simple absolute to one undivided part subject to said dower right (and so describe the interest of each defendant); that the defendants , and , who are infants herein, are entitled to an undivided share thereof, subject to said dower right; and that the defendant is the wife of the defendant , and entitled to her inchoate right of dower in said one undivided part of said described premises; and the said referee having found that the said property is so situated that a partition thereof can be made without great prejudice to the owners thereof, it is further

Ordered, That the and and are hereby appointed as reputable and disinterested freeholders of the county of Fulton and State of New York, as commissioners, to make a partition of said property as hereinbefore described; and so distribute and partition the said property among the different parties herein as their rights, shares and interests; and it is hereby directed that said commissioners are directed before entering upon the execution of their duty, to subscribe and take the oath of office, and file the same with the clerk of the county

of Fulton for the faithful performance of their duties; and to proceed and make partition as directed in this order unless it should appear to a majority of them that a partition could not be made without great prejudice to the owners, in which case they shall make and render a report of that fact to this court; and they shall distribute said property into distinct parcels, allotting it to the several parties thereof, quality and quantity being considered according to their respective rights, shares and interests of the parties, as is fixed by this judgment; and shall designate said partitions by permanent monuments; and they are also hereby directed and authorized to employ surveyors and all necessary assistance in aiding them in so doing and partitioning thereof.

Enter in Fulton county.

M. L. S.,
J. S. C.

Oath of Commissioners.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

STATE OF NEW YORK, }
County of Fulton, } ss.:

We, _____, and _____ and _____, commissioners duly appointed by an interlocutory judgment made and entered herein on the _____ day of _____, 189____, to make partition of the property in said judgment, each for himself swears that he will faithfully, honestly and impartially discharge the trusts imposed in him.

..... Sig.

..... Sig.

..... Sig.

Sworn to before me this '
day of , 189 .

EMMA J. O'CONNOR,
Notary Public,
Fulton County.

(NOTE.— This oath must be filed with the county clerk before the commissioners can enter upon or execute their duties.)

Report of Commissioners Making Partition.

(See text, pages 67, 69.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

To the Supreme Court:

In pursuance of an interlocutory judgment made in the above-entitled action, and entered in the office of the clerk of the county of Fulton, on the day of , 189 , we, the undersigned commissioners hereby appointed and designated to make partition of the premises described in said judgment, among the parties entitled thereto, according to their respective rights, shares and interests, do report as follows: That before we entered upon the duties of our said office we subscribed and took the oath of office as is authorized by law, and filed the same with the clerk of the county of Fulton on the day of , 189 ; we have also carefully examined the premises described in said judgment, and caused them to be surveyed, and made partition thereof between the parties to said action, according to their respective shares, rights and interests therein, as the same has been ascertained and determined by this court, in and by said judgment in the manner following: That we have set off and allotted to the defendant , the widow of , deceased, as her

dower right in said premises, described as follows, to wit: (Description.)

Second. We divided the whole of said premises, after having set aside said dower right as above designated, into allotments and lots of land, which are designated on a map hereto annexed by figures "one," "two" and "three," etc.; which lots are in our opinion equal in quantity and value; and that being in our judgment the most beneficial division that could be made of said premises. We have also set off in severalty to the plaintiffs herein all that certain piece, lot or parcel of land as designated on said map by the figure "one," which is respectively bounded and described as follows, to wit: (Description. Herein set forth the courses, distances, posts, stones and other permanent monuments.) We have also set off in severalty to the said defendant , all that other certain piece, parcel or lot of land designated on said map by the figure "two," which is respectively bounded and described as follows: (Description. So proceed with each of the allotments to each of the defendants, and give a description of the part so allotted.) We have also allotted each of the parties to this action a separate and distinct parcel of land, and which they were entitled upon determining of the dower interest by the death of said , the widow of , deceased, as it will appear upon said map, and designated by the letters A, B and C, which said parcel was allotted to each plaintiff and to the defendants as their respective shares in said property. (If there are unknown defendants then report as to what share is set off to them, as such defendants, and a description of the premises so set off. If it should appear that partition cannot be made equally between the parties according to their respective rights, shares and interest without great prejudice to the owners thereof, then state that compensation is to be made between the parties as follows: That the plaintiff is to pay

to the defendant _____, the sum of
dollars, etc.)

We do further state and report that the items of the various expenses attending the said commissioners in said partition, including our fees as commissioners, together with the items of charges for the services of surveyors, are as follows:

2 day's services for each of said commissioners, at \$5 per day.	\$30 00
1 day's service for 1 surveyor.....	5 00
2 assistants, at \$2 each.....	4 00

Making a total of..... \$39 00

And we have also caused a map to be made of the land as herein partitioned, showing what parts of the said premises have been allotted to the respective parties, which map forms a part of this our report, and is hereto annexed and marked "Exhibit A."

In witness whereof, said commissioners have hereunto
set their hands to this their report this day of
 , 189 .

..... **Sig.**
 **Sig.**
 **Sig.**

(Acknowledgment.)

Notice to Apply for Confirmation of Commissioners' Report and
Final Judgment.

(See text, page 69.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Sir.—Take notice that I will apply at the Special Term of the Supreme Court of the State of New York, to be held in the city of Amsterdam, N. Y., on the _____ day of _____, 189____, for an order confirming the commissioners'

report, a copy of which report you are herewith served; and for final judgment partitioning the lands herein as therein set forth and reported.

CLARENCE W. SMITH,

Plaintiff's Attorney.

Office and post-office address,

Cor. Main and William Sts.,

Johnstown, N. Y.

To _____, Attorney for Defendant, and _____,
Attorney for Guardian ad litem, Johnstown, N. Y.

Final Judgment of Actual Partition.

(See text, pages 70, 71.)

At a Special Term of the Supreme Court of the
State of New York, held in the city of Amsterdam,
N. Y., on the _____ day of _____, 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

This action having been brought on to be heard upon the report of _____ and _____ and _____, the commissioners duly appointed in and by virtue of the interlocutory judgment made and entered in this action on the _____ day of _____, 189 , and upon reading and filing said report which bears date the _____ day of _____, 189 , and proof of due service of the notices of application for judgment upon the attorneys for the several parties herein, who have appeared herein, and upon the attorney for the guardian ad litem of the infants, _____, defendants; and it appearing by said report that said commissioners have made partition of the said premises described in the complaint in this action between the parties herein, according to their respective

rights, shares and interests, as the same has been ascertained and determined by this court; and the said commissioners having divided the whole of said premises herein; and that a portion therein is set off to _____, defendant, the widow of _____, deceased, as her dower right therein, and the balance divided into allotments of equal value and quantity; and after having set off in severalty to the plaintiff _____ one of said allotments herein described as follows: (Description); and it also appearing by said report that by said partition the commissioners have set off to the defendant another part of said premises, which is herein described as follows: (Description); and it further appearing by said report that the said commissioners have set off to the defendant _____ as her dower right in said premises the portion described as follows, to wit: (Description.) (Also give each allotment to each defendant, and give description of each.) Now, on motion of _____, of counsel for the plaintiff, and after hearing _____, attorney for the defendant, it is

Ordered and adjudged, That the said report be and is in all things confirmed, and that the said allotments as so made by said report do, and they hereby are ordered to stand; and that the partition so made may be firm and effectual forever; and it further appearing to the court by said report that partition cannot be made equally between all the parties according to their respective rights without great prejudice to the rights and interests of some of them that the following payments are necessary to produce such equality, and it is therefore further

Ordered and adjudged, That a compensation be made, and it is hereby distributed between the parties as follows: That the defendant, _____, pay to the plaintiff, _____, the sum of _____ dollars; that the defendant, _____, pay to the defendant, _____, the sum of _____ dollars; and it is further

Ordered and adjudged, That each of the parties who are entitled to the present possession of all of that tract, piece or parcel of land so allotted and assigned to them respectively, be let into the possession thereof immediately; that the parties who are entitled to the possession of that distinct parcel of said premises, allotted as the dower interest therein of the defendant, _____, be let into possession of said property, after determining the said estate of _____, the widow of _____, deceased; and it is further

Ordered and adjudged, that the said _____ pay to the plaintiff the costs and charges of this proceeding, amounting in all to the sum of _____ dollars, and that the said plaintiff have execution therefor.

Enter in Fulton County.

M. L. S.,
J. S. C.

Affidavit for Reference, to Ascertain Liens.

(See text, page 71.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

Clarence W. Smith, being duly sworn, says that he is the attorney for the plaintiff herein, and that there are creditors who have liens against the rights, shares and interests of the defendants herein, in said property; which said creditors are not made parties to this action, and the amount and nature of their liens is unknown to this deponent; and that no certified search has been made herein.

Wherefore, deponent asks that a referee be appointed to ascertain the names of said creditors, and the nature and amount of said lien.

(Jurat.)

.....

Notice of Application for the Appointment of Referee.

(See text, page 64.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Sir.—Take notice that I will move this court at a Special Term thereof, to be held in the city of Amsterdam, N. Y., on the day of , 189 , for an order appointing a referee to ascertain the names of the creditors, and the amounts and nature of said liens against the property in this action.

Yours, etc.,

CLARENCE W. SMITH,
Attorney for Plaintiff.

Office and post-office address,
Johnstown, N. Y.

To Frank L. Anderson, Esq., Defendant's Attorney, 142
West Main street, Johnstown, N. Y.

Order Appointing Referee to Ascertain Liens.

(See text, page 64.)

At a Special Term of the Supreme Court of the
State of New York, held at the chambers of
Hon. M. L. S., in the city of Amsterdam, N. Y.,
on the day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

This cause having been begun in this court for the partition of certain real property as described in said complaint herein; and it appearing to the court that a partition thereof cannot be made without great prejudice to

the parties interested therein; and that a sale of the said property would be most beneficial to the parties herein; and it further appearing to the court that no search certified by the clerk of the county of Fulton as to any liens, or as to any creditors, has been made against said property herein; and it further appearing that due notices of this application for an order appointing a referee to ascertain whether there are any creditors not parties to this action who have liens on said property, or on any undivided share, right or interest thereof, has been duly served upon the parties herein. Now, on motion of C. W. S., attorney for the plaintiff, and no one appearing in opposition, it is

Ordered, That _____, Esq., an attorney and counselor-at-law of the city of Johnstown, N. Y., be and he hereby is appointed referee in the above-entitled action to ascertain and report to this court whether there is any creditor not a party to this action, and if there is any liens upon any undivided share, right or interest of any party, and the name of said creditor, together with the nature and amount of said lien, and the amount due or to become due thereon.

Enter in Fulton county.

M. L. S.,
J. S. C.

Notice to Creditors to Present Claims.

(See text, page 64.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

The undersigned referee duly appointed in the above-entitled action by an order of this court made and entered on the _____ day of _____, 189____, and duly entered in the clerk's office of the county of _____, on the _____ day

of , 189 , do hereby require each and every person and persons not a party to this action, and who have liens upon any undivided share or interest of the property hereinafter described, to appear before me, the undersigned referee, on the day of , 189 , at my office No. street, in the city of Johnstown, N. Y., and prove said claim, with the true amount due or to become due thereon, with the date thereof, and the nature of the said claim respectively, which is a lien upon said premises, or any share or interest in the following described premises, to wit: (Description.)

Dated at , this day of , 189 .

.....

Referee.

(NOTE.— This notice must be published once each week for six successive weeks, in a newspaper published in the county wherein the place of trial is designated; and also in a newspaper published in each county wherein the property is situated.)

Referee's Report.

(See text, page 64.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

To the Supreme Court:

In pursuance of an order made and entered in the above-entitled action in the Fulton county clerk's office, on the day of , 189 , I, the undersigned referee, do hereby report that before entering upon my duties as such referee herein, I took the authorized oath of office as said referee; and as such referee I caused to be published once a week for six successive weeks in the , a newspaper published in the county wherein the place of trial is designated; and also wherein said

property is situated; requiring each person not a party to this action, who had any lien upon any undivided share or interest in the property herein described (description), to appear before me at my office, No. street, in the city of Johnstown, N. Y., on the day of , 189 , to prove his lien and the true amount due or to become due to him by reason thereof. And I do hereby report that upon said date I was attended by the respective counsel for the parties herein; and that there was presented to me upon said date, and duly proven, the following liens, to wit:

That is a creditor, and his lien which was satisfactorily proven before me, being a judgment against , one of the defendants herein, which judgment was filed in the Fulton county clerk's office on the day of , 189 , and amounts to the sum of dollars, and that there is now due thereon the sum of dollars (so proceed as to the name and extent of each lien, and the amount due and to become due thereof), which is a lien upon said defendant's share.

All of which is respectfully submitted.

.....
Referee.

Interlocutory Judgment to Sell.

(See text, page 65.)

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the city of Johnstown, N. Y., on the day of , 189 .

Present — Hon. S. A. Kellogg, Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

On reading and filing the report of , the referee appointed in the above-entitled action, by an order

of this court, made and entered on the day of , 189 ; and the report of , the referee appointed to ascertain liens; and on reading and filing proof of due service of this motion on , attorney for the defendant, ; and upon , attorney for , guardian ad litem for , an infant; and after due deliberation having been had. Now, on motion of C. W. S., attorney for the plaintiff, it is

Ordered, adjudged and decreed, That the respective rights, shares and interests of the parties to this action, and to all the property mentioned and described in the complaint, are as follows: That the plaintiff, , is seized of and entitled to one undivided share thereof, subject to an inchoate right of dower therein of his wife, the plaintiff, ; that the said , plaintiff, is thirty-eight years of age, and the said , his wife, is thirty years of age; that the defendant, , is seized of and entitled in fee simple absolute to one undivided part thereof, and is unmarried; that the defendant, , is seized of and entitled to one undivided part thereof; that the defendant, , is seized of and entitled in fee simple absolute, to one undivided part thereof, and is a minor under the age of twenty-one years. (Here recite the interests of the other defendants, who are minors, and the defendants who have an inchoate right of dower, or are tenants by curtesy.)

That the defendant, , is the widow of , deceased, and is entitled to her dower right in the whole of said premises, and is of the age of years; and it having been found by said report that said property is so circumstanced that a partition cannot be made without great prejudice to the owners; it is further

Ordered, adjudged and decreed, That the said property mentioned and described herein, to wit: (Description), and all the estate, right, title and interest of the parties to the suit herein, whether creditors or otherwise; and the

rights of each, and any other person who may become entitled in said premises, be sold at public auction at the _____ of the _____, in the city of _____ and county of Fulton, the county where said premises are situated, by and under the direction of _____, an attorney and counselor-at-law of the city of _____, who is hereby appointed referee for the purpose of making the sale; and that the said referee give due notices of such sale according to the direction of this court; that the said sale is to be made for cash; and that the plaintiffs or any one of the parties to this action may become a purchaser or purchasers thereof; and it is further

Ordered, That the said referee, after completing said sale, file with the clerk of the county of _____, his report thereof under oath, containing a description of the property sold, with the name of the purchaser or purchasers thereof, of each parcel so sold, and the price that each parcel was so sold for.

Notice of Sale.

(See text, page 71.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

In pursuance of a judgment made and entered in the above-entitled action, in the office of the clerk of the county of _____, on the _____ day of _____, 189 , I, the undersigned referee, in and by virtue of said judgment, will sell at public auction at the front door of the Court House in the city of Johnstown, N. Y., on Saturday, the _____ day of _____, 189 , at 10 o'clock A. M., the land and premises in said judgment directed to be sold therein, described as follows: (Description), to the highest and best bidder for cash.

Dated at _____, this _____ day of _____, 189 .

HARWOOD DUDLEY,
Referee.

Referee's Report of Sale.

(See text, pages 71, 75.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To the Supreme Court:

I, _____, the referee appointed by an interlocutory judgment made and entered in the above-entitled action on the _____ day of _____, 189____, which said order directed me to sell the premises described in said order, do hereby respectfully report as follows:

First. That I advertised said premises to be sold at public auction by posting notices thereof at the entrance to the Court House in the city of Johnstown, N. Y., and at other public places in said city of Johnstown, N. Y. (name the places where posting was made), where the sale was to take place, at least forty-two days before the date of said sale.

Second. That previous to said sale I also caused notices thereof to be advertised at least once a week for six successive weeks immediately preceding said sale, in the Johnstown Daily Republican, a daily paper published at the city of Johnstown, N. Y., where said property is so situated, containing a description of the property so ordered to be sold; and I do further report that on the _____ day of _____, 189____, the date on which said property was so advertised to be sold, I attended at the time and place fixed for the sale, and exposed for sale to the highest bidder the said premises so advertised, and the said premises were then and there sold to _____, for the sum of _____ dollars, that being the highest amount bid for the same, and that the terms were reduced to writing and duly signed by the said _____; that the same is a description of the premises so sold to the above-named _____, purchaser (description); and I

do further report that the defendant is the widow of _____, deceased, and she has released her right of dower in said described property; and that the said release is hereto annexed and made a part of this, my report.

Dated this _____ day of _____, 189 .

Yours, etc.,

HARWOOD DUDLEY,
Referee.

Release of Dower by Widow.

(See text, page 79.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

I, _____, the widow of _____, deceased, one of the defendants in the above-entitled action, hereby acknowledge the receipt from _____, the referee, who sold the real estate and property for the sum of \$ _____, being my share of the proceeds of said sale in said judgment in this action; and in consideration thereof I do hereby release and quit-claim to _____, and do hereby relinquish all my estate, right, title and interest and dower right in and to said premises so sold as aforesaid.

Witness my hand and seal this _____ day of _____, 189 .
..... Sig.

(Acknowledgment.)

Notice to Apply for Confirmation of Referee's Report.

(See text, page 79.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Sir.—Take notice that I will apply at a Special Term of the Supreme Court of the State of New York, to be held

at the city of Amsterdam, N. Y., on the day of
 , 189 , for an order confirming the referee's report
 herein, a copy of which is hereto annexed; and for a final
 judgment directing the sale of said premises.

CLARENCE W. SMITH,
 Attorney for Plaintiff.

Office and post-office address,
 Cor. Main and William Streets,
 Johnstown, N. Y.

To F. L. A., Defendant's Attorney, Johnstown, N. Y., and
 A. J. N., Attorney for , the Guardian ad
 litem, Johnstown, N. Y.

Final Judgment to Sell.

(See text, page 70.)

At a Special Term of the Supreme Court of the
 State of New York, held in the city of Ams-
 terdam, N. Y., on the day of ,
 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

This cause coming on for final hearing upon the report
 of the referee appointed to make sale of the property so
 sought to be partitioned in this case, which report bears
 date the day of , 189 ; and due notices
 having been given to the attorney for the defendants who
 have appeared herein; and due notices having been given
 to the attorney for the guardian ad litem of the infant
 defendants, of this application for the confirmation of
 said referee's report for final judgment thereon. Now, on
 motion of A. J. N., attorney for the plaintiff, and after

hearing C. W. S., as counsel for the defendant ,
and F. L. A., as counsel for the guardian ad litem of said
infants, it is

Ordered and adjudged, That said report, and the same
hereby is in all things confirmed; and that said referee
is hereby ordered to execute to the purchasers upon said
sale a conveyance of the property so sold, upon said pur-
chaser complying in all respects with the terms of said
sale; and the said referee is hereby directed to deduct
from the proceeds of said sale the costs and disburse-
ments of said sale; and he is hereby directed to pay all
taxes, assessments and water rates which are liens upon
said property so sold; and he is also directed to deduct
from the proceeds thereof the costs and expenses of the
proceedings of this suit, which are adjusted at the sum of
dollars (\$), and pay the same to the
plaintiff's attorney herein; and it is further

Ordered and adjudged, That said referee pay to the
attorney for the guardian ad litem of the infant defend-
ants , out of the proceeds of said sale the sum
of dollars (\$), as his costs and expenses
of this action; and it is further

Ordered and adjudged, That whereas the defendant,
, is the widow of , deceased, and having
by an instrument in writing, duly signed and acknowl-
edged and filed releasing and relinquishing her dower
right, and consented to receive a gross sum in lieu thereof,
that she be paid the sum of dollars, that being the
sum fixed in satisfaction of her right of dower to the
premises so sold; and it is further

Ordered and adjudged, That the said referee pay and
distribute the residue of the proceeds of said sale
remaining after paying said costs and expenses, taxes,
assessments and water rates, and also said dower interest,
to the following named parties: To the plaintiff the one

undivided part thereof; to the defendant the one
undivided part thereof, on his obtaining the release
of his wife, the defendant , to him, of her
inchoate right in said premises, duly executed and
acknowledged, as required by law (and so continue as to
the interest of each defendant herein); and it is further

Ordered and adjudged, That the said referee bring into
court and deposit with the county treasurer of the county
of Fulton, subject to the order of this court, one equal
undivided part thereof of said residue for the benefit of
the owners unknown, to be invested in permanent
security, at interest, for their benefit, until claimed by
them or their legal representative; and it is further

Ordered and adjudged, That said referee take a receipt
for the amounts so paid by him, and file them with his
final report to be made subsequent thereto; and it is
further

Ordered and adjudged, That the said purchaser be let
into possession of said property, immediately upon the
production of the referee's deed to said premises; and it is
further

Ordered and adjudged, That the said referee make
report of his proceedings before the rendering of the final
judgment.

M. L. S.,

J. S. C.

Enter in Fulton county.

(NOTE.— If there are any creditors who have estab-
lished liens against said property, always insert a clause
in said judgment with the names and the amounts due
upon said liens, and also that the amounts due upon said
liens be deposited or paid into court in payment of said
liens; stating whether said liens are upon the whole of
said property or upon any share or interest of any of the
defendants of said property.)

Notice to Apply for Order Confirming Sale.

(See text, page 79.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

You will please take notice that upon the referee's report of sale in this action, which was duly filed in the office of the clerk of the county of Fulton on the day of _____, 189____, a copy of which is hereby served upon you, and upon all the papers hereinbefore served, and all the proceedings had in the above-entitled action, I will move the Supreme Court, at a Special Term thereof to be held in the city of Johnstown, N. Y., on the day of _____, 189____, at the opening of the court or as soon thereafter as counsel can be heard, for an order confirming said referee's report of sale, and for a final judgment in the above-entitled action, and for such other and further relief as to the court seems just and proper.

.....

Plaintiff's Attorney.

Office and post-office address,

.....

To _____, Defendant's Attorney, and Attorney for
_____, Guardian ad litem of _____, an infant.

—————

Referee's Final Report.

(See text, page 75.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To the Supreme Court:

I, _____, the referee duly appointed herein by an order of this court on the _____ day of _____, 189____,

having been ordered and directed by final judgment herein to make and certify to the disposition of the funds that came into my hands as said referee upon said sale of the property herein, in the above-entitled action, do hereby make and file my report thereof, as follows:

First. I have executed to _____, the purchaser upon said sale, a conveyance to the said property, he having complied in all respects with the terms upon said sale.

Second. That I have deducted from the proceeds of sale the fees and disbursements to which I am entitled; and have paid all taxes, assessments and water rates which were liens upon said property; and have paid to _____, plaintiff's attorney, the sum of _____ dollars as his costs and expenses of said proceedings; that I have paid to _____, attorney for _____, guardian ad litem for the infant defendants the sum of _____ dollars as his costs and expenses of this action; that I have paid to _____, the widow of _____, deceased, the sum of _____ dollars as her dower right in said property; that I have paid (here state the proportionate share of each of the parties, whether plaintiff or defendant, as is ordered by said final judgment); also, that I have brought into court and deposited with the county treasurer of the county of Fulton the sum of _____ dollars as the share of infants and parties unknown; that I have taken receipts for the payment of the same, which said receipts are hereto annexed and made a part of this, my said report, all of which is respectfully submitted.

HARWOOD DUDLEY,
Referee.

Order Substituting a Party, Upon the Death of Either Party.

(See text, page 58.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House in
the city of Johnstown, N. Y., on the
day of , 189 .

Present — Hon. L. W. R., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

The above-entitled action having been commenced by the service of a summons and complaint on the day of , 189 , and it appearing to the court that since the commencement thereof that one of the defendants therein, to wit, , has since died; that his interest in said action has passed to a person who is not a party to the action. Now, on motion of C. W. S., attorney for plaintiff, it is ordered that said , to whom all the interest of said , deceased defendant, has descended, be and the same is hereby made a party defendant to this action; and that a supplemental summons may be issued to him to bring him in as a party in said action.

L. W. R.,
J. S. C.

Enter in Fulton county.

CHAPTER III.

ACTION FOR DOWER.

Jurisdiction.

The jurisdiction to try all actions for the admeasurement of dower rights is in the Supreme and County Courts.
Code, §§ 217 and 340.

Facts necessary.

The right to maintain an action for dower rests in the fact of a marriage, seizen during marriage, and death of the husband; the right existed at common law, and is regulated only as to its procedure by the statute.

Where triable.

The action is a local action, and must be tried in the county in which the land lies.

Code, § 982.

When the question tried by a jury.

When the question is raised as to the right to bring the action, then the issue so made must be tried by a jury.

Code, § 968.

And then the proceedings are the same as in other actions.

Parties plaintiff.

The widow may maintain the action.

Code, § 1596.

Her assignee or a receiver in supplementary proceedings to whom her right has been assigned.

Payne v. Becker, 87 N. Y. 153.

Any person claiming to own the title or an interest in real estate, may bring an action to have a right of dower in the whole or any part of said property determined.

Code, § 1647.

But such action cannot be brought until four months after her husband's death.

Infant against the widow.

An infant may bring an action against the widow who has wrongfully obtained dower by collusion with the infant's guardian.

Code, § 1605; Ejectment, ch. 1, page 8.

Parties defendant.

The occupant of the property must be made defendant.

Code, § 1597.

When property not occupied.

If unoccupied, then all persons exercising acts of ownership or claiming title thereto or an interest therein at the time of commencement of the action.

Code, § 1597.

Any person claiming title to or right of possession to the land may be made defendants.

Code, § 1598.

In an action to recover dower in a distinct parcel or of all the real property which the husband aliened by a conveyance, all persons in possession or claiming title thereto, or any part thereof, may be parties defendant.

Code, § 1599.

When heirs necessary.

When the action is against the heirs to recover dower and the rents and profits, all the heirs are necessary parties.

Van Name v. Van Name, 23 How. Pr. 247.

The right to bring the action when brought.

The widow being entitled to the rental value of one-third of the real property of which her husband was seized during marriage, is entitled to have one-third of such estate set off to her, or she may consent to accept a gross sum, and is entitled to recover it; and if the land cannot be divided she is entitled to have it sold.

Code, §§ 1613, 1617, 1619.

When gross sum is to be estimated.

The gross sum is to be estimated, and one-third of the value of the land at the date of its alienation.

Sidway v. Sidway, 23 N. Y. St. R. 305.

Free from taxes.

She is entitled to have lands set off to her free from taxes due from her husband, if the personal property of the husband is sufficient to pay the same.

Harrison v. Peck, 56 Barb. 251.

Damages.

She is also entitled to recover damages for the withholding of her dower, such as are allowable by statute.

Code, §§ 1600, 1601, 1602, 1603; Kyle v. Kyle, 67 N. Y. 400.

Premises covered by mortgage.

In premises covered by a mortgage executed by her and her husband, she is entitled to dower only, in the equity of redemption.

Time when the action must be brought.

She must bring her action within twenty years after the death of her husband.

Code, § 1596.

But if she be within the age of twenty-one, insane or imprisoned for less than life, or if her claim has at any time been recognized by deed or judgment of a court, such time is not a part of such limitation.

Code, § 1596.

PLEADINGS.**Complaint.**

The complaint must state the marriage and the name of the husband, the seizen of the husband during marriage, and the death, and may state that the husband died intestate. It should describe the land in which dower is claimed, with common certainty, setting forth the name of the township or tract, and the number of the lot if there is any, or in some other appropriate manner so that from the description the property can be easily found and divided.

Code, §§ 1511, 1606; Draper v. Draper, 11 Hun, 616.

Damages must be alleged.

And if damages are sought they must be alleged, and by what right plaintiff is entitled thereto, setting forth

the facts required by the Code, and that demand for dower had been made, and when.

Code, §§ 1600, 1601, 1602, 1603.

Judgment in the alternative.

The demand for judgment may be in the alternative that a distinct parcel be set off, or in case it is impracticable that the property be sold, and that plaintiff have the use of one-third of the proceeds thereof.

O'Dougherty v. Remington Paper Co., 42 Hun, 192.

In an action against the widow who claims a dower, the complaint should allege what estate plaintiff has, and should describe the land as above, and if plaintiff admits defendant's right of dower he should, in addition, substantially state the same facts as stated in a complaint by the widow, and that the defendant claims to have a right of dower, and that she is in all respects competent to maintain said claim, and that four months have elapsed since the death of her husband, and demand that her claim be admeasured. But if it does not admit her claim he should allege his estate, describe the land as above, and that defendant unjustly claims to have a right of dower in the whole or a part of the property, and that four months have elapsed since the death of her husband, and demand judgment that she be forever barred from such claim.

Code, § 1647; Linden v. Doetsch, 40 Hun, 239.

Lis pendens.

It is not necessary to file lis pendens in an action for dower (although it may be), for the reason all persons purchase subject to the dower right.

Defendant may answer or demur.

Answer.

The defendants by answer may deny any of the facts set forth in the complaint.

Seizen of the husband may be denied, although the defendant is a grantee of the husband by warranty deed, he is not estopped.

Finn v. Sleight, 8 Barb. 401; Sparrow v. Kingman, 1 N. Y. 242.

The acceptance of a gross sum in satisfaction of her claim may be pleaded as a bar.

Code, § 1604.

Judgment of divorce.

Judgment of absolute divorce against her may be pleaded in bar.

Code, § 1760.

PROCEEDINGS.

Receiver.

A receiver in a proper case upon a proper showing may be appointed.

Egan v. Walsh, 43 Super. 402.

Injunction.

Also waste may be restrained pending the action.

Code, § 1681.

Survey.

Also on a proper showing the court may order a survey.

Code, § 1682.

Finding of a jury.

When the case is tried by a jury they must find by special verdict the facts.

Vadney v. Thompson, 44 Hun, 1.

Judgment by default.

Upon default being made judgment can be only taken upon application to the court.

Code, §§ 1212, 1214.

Consent to accept a gross sum.

At any time before the interlocutory judgment is rendered, on default, or at any time before trial on an issue joined, the plaintiff may file with the clerk a consent to accept a gross sum in lieu of her dower in the property described in the complaint, which must be duly executed like a deed, and serve a copy with notice of filing upon each party who has appeared or who does appear.

Code, § 1617.

The gross sum to which she is entitled is ascertained by the North Hampton tables.

Rule 70.

Application to pay gross sum.

At any time after consent is filed and before interlocutory judgment, any defendant may apply to the court upon notice, for an order granting him leave to pay said sum, whereupon the court may ascertain the value of said dower by reference or otherwise, and make an order directing the payment by the applicant of such sum ascertained within sixty days after a service of a copy thereof, and direct the execution by the plaintiff of a release of her dower upon receipt of the money.

Code, § 1618.

How order enforced.

Said order may be enforced by contempt, as the striking out of the pleadings of the party disobeying, and rendering judgment against him or her both.

Code, § 1618.

Reference.

Where plaintiff has filed the consent, and she is entitled to an interlocutory judgment, the court must, upon application, ascertain by reference or otherwise, if a distinct parcel can be set off to plaintiff.

Code, § 1619.

Consent to take a distinct parcel.

If the property consists of one or more vacant or improved lots the plaintiff's consent may contain a stipulation to take a distinct parcel out of those lots instead of a gross sum; in that case the interlocutory judgment may direct that commissioners be appointed to lay off said parcel.

Code, § 1620.

Order to admeasure dower.

When the right of dower has been established an interlocutory judgment must be rendered directing (unless the widow has filed her consent to accept a gross sum), that the dower particularly describing it be admeasured by a referee named or three commissioners.

Code, § 1607; *Ellicott v. Mosier*, 7 N. Y. 201; *Witthaus v. Schack*, 38 Hun, 564; *Rice v. Thompson*, 42 N. Y. St. Rep. 426.

Amount of dower.

The widow is entitled to be endowed of one-third of the value of all lands aliened by the husband during coverture at the time of the alienation, and it must be ascertained on the trial the time of such alienation.

Marble v. Lewis, 53 Barb. 432.

Referee to try the issues.

A referee to try the issues cannot take proof as to the practicability of admeasurement unless that question has been raised by the pleading; but the court may. Still, the better practice is to order a referee to ascertain if actual admeasurement can be had.

O'Dougherty v. Remington Paper Co., 42 Hun, 192.

Oath of the referee or commissioners.

The referee or each of the commissioners must subscribe and take oath before an officer authorized in section 842, and must file said oath with the clerk before entering upon the execution of his or their duties.

Code, § 1608; Gale v. Endsall, 8 Wend. 460.

To fill vacancies.

The court may fill any vacancies.

Code, § 1608.

Duties of the referee or commissioners.

The referee or commissioners must, if they think it is for the best interest of parties, as speedily as possible lay off a distinct parcel constituting one-third of the property as plaintiff's dower, designating the part so laid off by posts or stones, or other permanent monuments.

Code, § 1609; Leonard v. Steele, 4 Barb. 20, 23; Price v. Price, 41 Hun, 489.

Improvements.

If any improvements have been made on the property after the death of the husband, or after alienation thereof by him, such improvements should not be included in the part laid off, or if they are, then deductions must be made from the part so laid off equal to the benefit she derives therefrom.

Code, § 1609.

Report.

If the referee or commissioners should decide it was not practicable for the interests of all to lay off any distinct parcel they should so report.

Code, § 1609.

Rights.

They may employ a surveyor to assist if they choose.

Code, § 1609.

All commissioners must meet together, but a majority rules.

Code, § 1610.

Report.

The referee or commissioners or a majority of them, must make a full and complete report of their proceedings. Which report must be acknowledged as a deed.

Code, § 1610; Price v. Price, 11 Civ. Pro. Rep. 364.

Court may set aside.

Upon application and good cause shown the court may set the report aside and appoint a new referee or new commissioners.

Code, § 1611; Jackson v. Waltermire, 7 Cow. 353.

Final judgment.

Final judgment must be rendered upon the report being confirmed, that the widow is entitled to the possession during her natural life of the parcel set off to her.

Code, § 1613.

Fixed sum in lieu.

If the report is that it is impracticable to set off a distinct parcel, then it should award that a fixed sum be paid her annually during her life equal to one-third of the rental value of the real property as ascertained, and that said sum be and remain a charge upon the property.

Code, § 1613.

Damages.

It may also award damages for the withholding of her dower.

Code, § 1613; Graham v. Linden, 50 N. Y. 547; Jackson v. Miller, 17 Johns. 123; Jackson v. Clarke, 5 Cow. 168; McIntyre v. Clark, 6 N. Y. St. R. 531; Price v. Price, 41 Hun, 489.

Action to recover sum awarded.

The plaintiff may enforce payment of the sum awarded by action against the owner or against the property.

Code, § 1614.

Order to increase or decrease the amount.

If at any time it is made to appear that the rental value has increased or diminished, the court may make an order upon notice to all parties interested, modifying the final judgment by increasing or diminishing the sum paid plaintiff.

Code, § 1614.

Lien upon the property.

A lien upon the property inferior to plaintiff's rights, attaches to the residue of the property when a portion is set off to the widow.

Code, § 1615.

Appeal.

An appeal may be taken from the final judgment.

Code, § 1616.

If the appeal is taken from the judgment awarding a part of the property to the widow, it does not stay the execution thereof unless granted by the court, and will not then be stayed if the widow gives an undertaking.

Code, § 1616.

Sale.

In these proceedings when it appears to the court that the widow has filed her consent to accept a gross sum in lieu of her dower, the interlocutory judgment must direct a sale of the premises by the sheriff or a referee named therein.

Code, § 1619; *O'Dougherty v. Rem. Paper Co.*, 42 Hun, 192; *Price v. Price*, 11 Civ. Pro. Rep. 365.

To ascertain liens.

Before the interlocutory judgment is rendered a reference must be ordered to ascertain what liens, if any, exist against the property, unless the party produce a proper search.

Code, §§ 1561 and 1621; *Clark v. Clark*, 84 Hun, 362.

If the dower is inferior to the lien the court may direct the land to be sold subject to such lien, or that it be satisfied out of the proceeds of the sale.

Code, § 1622; *Clarke v. Clarke*, 65 N. Y. St. R. 487.

Parties bound by the sale.

If the sale is confirmed each party to the action and every person deriving title through them, after the filing of the judgment roll or of the *lis pendens*, are barred of and from any right, title or interest therein.

Code, § 1619.

Manner of conducting the sale.

The proceedings to sell are the same as in partition.

See ante, pages 71-76.

Purchase money mortgage.

The dower is subject to a purchase money mortgage, whether the widow has signed or not.

Brackett v. Baum, 50 N. Y. 8.

Report of sale.

After completing the sale and executing the proper conveyances the officer making the sale must make and file his report thereof with the clerk.

Code, § 1623; *Clark v. Clark*, 84 Hun, 362.

Court to ascertain the rights of each party and the value of dower.

The court, after confirming the sale, must ascertain by reference or by taking proof, what are the rights of each party to the proceeds, and what is the value of the widow's dower by the North Hampton tables, and must render final judgment confirming the sale and directing that the sum so found be paid the widow, and the remainder be divided among the persons entitled thereto.

Code, § 1624; *Clark v. Clark*, 65 N. Y. St. Rep. 487.

Fees and expenses to be taxed.

The fees and expenses must be taxed under the direction of the court, and the amount paid by the plaintiff and taxed in her costs.

Code, § 1612.

Costs.

The plaintiff is entitled to costs, of course, upon a judgment in her favor.

Code, § 3228.

The admeasurement of dower is conclusive, and plaintiff has no right to any of the remainder of the property.

Graham v. Linden, 50 N. Y. 547.

Her title relates back to the date of the husband seizen, if after marriage, or to the date of marriage, and she is entitled to the crops upon the part assigned if planted or sowed by the husband and the fruit and grass not gathered or cut when the dower was assigned.

Lawrence v. Brown, 5 N. Y. 394; Kain v. Fisher, 6 N. Y. 597.

Injunction.

An injunction cannot be granted to stay an action for dower after verdict unless an undertaking be given to pay all damages and costs.

Code, § 616.

Such damages include the rents and profits and all waste committed.

Code, § 617.

Execution to enforce judgment.

Judgment for dower may be enforced by execution.

Code, § 1240; Skinner v. Odenbach, 81 Hun, 315.

Preferred causes.

An action for dower is a preferred cause upon proper showing by proof by affidavit that the widow has no sufficient support aside from her dower.

Code, § 791, sub. 6; Bartlett v. Musliner, 92 N. Y. 646.

Widow of an alien.

A widow of an alien who dies within six years after filing his deposition to become a citizen, and before he is admitted to citizenship, is entitled to dower.

Laws 1896, ch. 547, § 5; Nolan v. Command, 11 Civ. Pro. Rep. 297.

Arbitration.

The settlement of a dower right cannot be submitted to arbitration.

Code, § 2365.

Dower in a contract.

The widow is entitled to dower of one-third of the balance in a contract held by her husband for lands, after deducting all moneys due thereon.

Code, § 2794.

Dower in lands sold to pay decedent's debts.

Lands sold to pay decedent's debts are not subject to dower rights unless said dower has been assigned; and if the same has been assigned then the grantee takes the part assigned to her subject to her dower right.

Code, § 2778; Estate of Haight, 14 Civ. Pro. Rep. 359.

PRECEDENTS.

Complaint for Dower.

(See text, page 127.)

SUPREME COURT — COUNTY OF FULTON.

EMMA J. O'CONNOR, Plaintiff, against MARY P. O'CONNOR and FRANK V. O'CONNOR, as Heirs-at-law and Next of Kin of JAMES M. O'CON- NOR, Deceased.

Plaintiff complains of the above-named defendants, and alleges as follows:

First. That plaintiff was lawfully married to the said James M. O'Connor, and lived and co-habited with him until the time of his death, which occurred on the day of , 189 ; that the said James M. O'Connor, during said marriage and co-habitation, and at the time of his death, was seized and possessed of the following described lands situate in the county of Fulton and State of New York, to wit: (Description.)

Second. Plaintiff further alleges that she is entitled to one undivided third part of said described premises for her life, as her reasonable dower in said described premises.

Third. That the said James M. O'Connor left surviving him, besides the plaintiff herein, the said defendants Mary P. O'Connor and Frank V. O'Connor, as children and heirs-at-law; and that upon his death said lands and premises hereinabove described descended to said chil-

dren, as heirs-at-law of the said deceased; and that plaintiff, as his wife, has a dower right in said premises.

Fourth. Plaintiff further alleges that at the time of the commencement of this action that said heirs, the defendants herein, were and now are in possession of and occupy said premises, claiming title thereto and the right to possession of said premises; and that they unlawfully and unjustly withhold from the plaintiff the possession and use of her said one-third part thereof as her dower right in said premises.

Fifth. Plaintiff further alleges that the annual value of the mesne profits of the property so occupied by the defendants since the death of the said James M. O'Connor, deceased, which have accrued within six years since his death, with the interest thereon, amounts to the sum of
dollars (\$).

Wherefore, plaintiff demands judgment that she recover the possession of her one undivided one-third part of said premises for her life, against the said defendants Mary P. and Frank V. O'Connor.

I. That the said dower of the plaintiff of the lands and premises hereinbefore described may be set off and admeasured to the plaintiff by a referee appointed for that purpose (or commissioners), in such a way as the court may direct, and in case it is impracticable to so set off and admeasure said dower, that the property may be sold, and that the plaintiff have the use of one-third of the proceeds thereof.

II. That the said plaintiff further recover damages of the said defendants for the withholding of her dower right, from the time of the death of the said James M. O'Connor, deceased, to the commencement of this action, being the amount of one-third of the annual value of the mesne profits of said property, with interest, amounting

in all to \$ _____, and that she have the costs of this action.

JOHN M. CARROLL & SON,

Plaintiff's Attorney,

Kennedy Building,

Johnstown, N. Y.

(Verification.)

Complaint for Dower in Aliened Property.

(See text, page 131.)

SUPREME COURT — COUNTY OF FULTON.

EMMA J. O'CONNOR, Plaintiff,

against

JOHN A. WHITE, Defendant.

Plaintiff complains of the above-named defendant, and alleges as follows:

First. That she is the widow of James M. O'Connor, late of the city of Johnstown, county of Fulton and State of New York; that the said James M. O'Connor, deceased, died in the said city of Johnstown, N. Y., on the day of _____, 189____, intestate, leaving him surviving this plaintiff and Mary P. and Frank V. O'Connor, as children and heirs-at-law of the said James M. O'Connor, deceased. That the said deceased was, during his lifetime, seized of and in possession of the property hereinafter described, which said property the said deceased, during the coverture of this plaintiff by a deed in writing conveyed and aliened to the defendant herein all of the said property situated in the county of Fulton and State of New York, bounded and described as follows: (Description.)

Second. Plaintiff further alleges that upon the death of the said James M. O'Connor, deceased, she, as his widow, became entitled to and is entitled to her dower

right in said premises to the extent of the life use of one-third thereof.

Third. Plaintiff further alleges that on the day of , 189 , and since the death of said James M. O'Connor, deceased, she has demanded of the defendant her dower right in said premises; and that the said defendant wrongfully and unlawfully withholds the same from the said plaintiff herein, and refuses to admeasure to and pay over to this plaintiff the same.

Fourth. Plaintiff further alleges that the amount of one-third of the annual mesne profits of said described property, with the interest, amounts to the sum of dollars, and that she is entitled to recover as her damages the sum of dollars, being the amount of said mesne profits since the time she made her demand for her dower right herein, over and above the use of any permanent improvements made by said defendant herein since the death of her said husband.

Wherefore, plaintiff demands judgment:

I. That she recover the possession of her one undivided one-third part of said premises as her dower right, against the said defendant herein.

II. That the said dower of the plaintiff of the lands and premises hereinbefore described may be set off and admeasured to the plaintiff by a referee appointed for that purpose (or commissioners), in such a way as the court may direct; and in case it is impracticable to so set off and admeasure said dower, that the property may be sold, and that the plaintiff have the use of one-third of the proceeds thereof.

III. That the said plaintiff further recover damages of the said defendant for the withholding of her dower right from the time of the demand, to wit, from the day of , 189 , to the commencement of this action, being the amount of one-third of the annual mesne profits

of said property, with interest, and that she have the costs of this action.

JOHN M. CARROLL & SON,

Plaintiff's Attorney.

Office and post-office address,

Kennedy Building,

Johnstown, N. Y.

(Verification.)

Complaint to Compel Determination of Dower.

(See text, page 127.)

SUPREME COURT — COUNTY OF FULTON.

JOHN A. WHITE, Plaintiff,

against

EMMA J. O'CONNOR, Defendant.

Plaintiff complains of the defendant, and states the following facts to the court:

First. That he is the owner in fee of all the following described premises, situate in the county of Fulton and State of New York, bounded and described as follows, to wit: (Description.)

Second. That the defendant herein is the alleged widow of James M. O'Connor, deceased, late of the city of Johnstown, N. Y., and claims to have a right of dower in the whole of said property.

Third. Plaintiff further alleges, upon information and belief, that said defendant is not, and never was legally and lawfully married, and is not the widow of the said James M. O'Connor, deceased, and is not entitled to any dower right in said property, and that her claim thereof is unjust, illegal and unlawful.

Wherefore, plaintiff asks judgment that a determination of her claim may be had, and that she be forever barred from said claim, and that he have the costs of this action.

Office and post-office address,
142 West Main Street,
Johnstown, N. Y.

(Verification.)

(See text, page 128.)

EMMA J. O'CONNOR, Plaintiff,
against
JOHN A. WHITE, Defendant.

First. Denies that the said James M. O'Connor, deceased, was ever seized of and the owner of the lands and premises described in the complaint of the plaintiff's.

Third. Defendant further answers the plaintiff's complaint and alleges that on the _____ day of _____, 189____, in the Supreme Court of the State of New York, the said James M. O'Connor, deceased, by a judgment made and

(See text, page 129.)

Present — Hon. M. L. Stover, Justice.

JOHN A. WHITE, Defendant.

M. L. S.,
J. S. C.

(NOTE.— This order is the same where a verdict is made entitling plaintiff to a dower.)

Notice of Motion for the Appointment of Referee.

(See text, page 130.)

SUPREME COURT — COUNTY OF FULTON.

EMMA J. O'CONNOR, Plaintiff,

against

JOHN A. WHITE, Defendant.

Sir.— Take notice that upon the verdict rendered upon the trial of the above action at the Trial Term of this court, held in the city of Johnstown, N. Y., on the day of , 189 , before Hon. M. L. S., justice, and a jury; and the jury having found a verdict in favor of the plaintiff; and that she is entitled to her dower right in the premises described in the complaint thereon; and upon all the proceedings had and the papers filed thereon, and upon the official searches to be produced herein, a motion will be made at a Special Term of the Supreme Court to be held in the city of Amsterdam, N. Y., at the chambers of the Hon. M. L. S., justice, on the day of , 189 , at the opening of the court on that day, or as soon thereafter as counsel can be heard, for an order appointing a referee to ascertain whether a distinct parcel of said real property can be admeasured and set off to this plaintiff as her dower right without material injury to the interest of the parties herein, or if a distinct parcel cannot be so laid off for an order directing a sale of said premises by the referee named therein; and for a further order directing that the said referee is to ascertain whether any persons not a party to this action has a lien on said prem-

FRANK L. ANDERSON,
Plaintiff's Attorney.

To Clarence W. Smith, Esq., Defendant's Attorney,
Johnstown, N. Y.

Order for Reference.

At a Special Term of the Supreme Court of the
State of New York, held at the Court House in
the city of Johnstown, N. Y., on the
day of , 189 .

EMMA J. O'CONNOR, Plaintiff,
 against
JOHN A. WHITE, Defendant.

The above-entitled action having been brought on for trial at a regular trial term of this court, held at the Court House in the city of Johnstown, N. Y., on the day of , 189 , and a verdict having been rendered declaring the plaintiff to be entitled to her dower right in the real property described in the complaint; and due notices having been made and served of the application to be made to this court for the appointment of a referee to admeasure and fix the said dower right in said prop-

erty, which said notice was served upon the parties herein. Now, on motion of Frank L. Anderson, attorney for the plaintiff, and no one appearing in opposition thereto, it is

Ordered, That it be referred to _____, Esq., a counselor-at-law, to ascertain the value of the plaintiff's right of dower in the premises described in the complaint, and to admeasure the same, and set off and apportion to the said plaintiff the distinct parcel of said premises, being one-third of the value of the same; and if said premises cannot be so apportioned without material injury to the parties herein concerned, to so report; and also to ascertain the value and amount of plaintiff's damages; and if there are any liens against said property; and to make his report to this court with all convenient speed.

Enter in Fulton county.

M. L. S.,
J. S. C.

Oath of Referee or Commissioners.

(See text, page 131.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

I, the undersigned referee, do solemnly swear that I will faithfully, honestly and impartially execute the trust imposed in me by the interlocutory judgment herein entered on the _____ day of _____, 189____, appointing me as referee to admeasure the dower right of the plaintiff herein, in and to the property described in said judgment.

.....

Referee.

(Jurat.)

(NOTE.—This same oath may be taken by the three commissioners.)

Order Appointing Hearing Before Referee.

(See text, page 131.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

I, the undersigned referee, duly appointed by an order made and entered in the Fulton county clerk's office on the day of , 189 , whereby it was referred to me to admeasure the dower of Emma J. O'Connor, the plaintiff herein, do hereby appoint the day of , 189 , as the date for the admeasurement of said dower, and you are hereby ordered to appear at my office, No. 2 North William street, in the city of Johnstown, N. Y., as the place for the hearing in said matter.

Dated at Johnstown, N. Y., this day of , 189 .

C. W. S.,
Referee.

Notice of Hearing Before a Referee.

(See text, page 131.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

Sir.— Take notice that you are hereby notified of a hearing to be held before Clarence W. Smith, Esq., as referee, at No. 2 North William street, in the city of Johnstown, N. Y., on the day of , 189 , by virtue of an order of hearing heretofore made by the said referee in the above-entitled matter.

Yours, etc.,

FRANK L. ANDERSON,

Attorney for Plaintiff.

Office and post-office address,

142 West Main Street,

Johnstown, N. Y.

To R. P. Anibal, Esq., Defendant's Attorney, Johnstown,
New York.

Referee's Report.

(See text, page 132.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To the Supreme Court of the State of New York:

I, William H. Bass, the referee appointed by an order of this court made and entered on the day of , 189 , to admeasure the dower right of Emma J. O'Connor, the widow of James M. O'Connor, deceased, in and to the property of which said deceased was seized, and which property is situated in the county of Fulton and State of New York, and described as follows: (Description), do respectfully report as follows: That before entering upon the duties as said referee I took and filed the oath of office as prescribed by law.

Second. That on the day of , 189 , I was attended at the premises hereinbefore described by Frank L. Anderson, the attorney for the said widow; and by the defendants' attorney Clarence W. Smith; and that they appeared before me at the time and place aforesaid; and I took evidence of the permanent improvements made thereon after the death of the said plaintiff's husband.

Third. I do further report that in my opinion, that it is not for the best interest of the parties concerned to admeasure and lay off to the said Emma J. O'Connor, the plaintiff herein, a distinct parcel of the said property, for the following reasons:

First. That the property consists of flats and tenement houses situate in the city of Johnstown, N. Y., and that the same cannot be divided or separated without injuring the value of the rest of the property; and if any part should be admeasured and one-third thereof set apart for said plaintiff, it would render the remaining part practically useless to the defendants herein.

I do further report that I was attended at my office wherein said parties duly appeared by their respective attorneys and took testimony of several of the witnesses to ascertain the rental value of said property; the testimony of said witnesses is hereto annexed; and I do further report that after hearing the testimony of the said witnesses as aforesaid, I ascertained that the rental value of the said property, not including the improvements made thereon since the death of said plaintiff's husband, is the sum of dollars per annum; and I do further report that as such referee, my charges are as follows:

Attendance at said property to ascertain if property could be so admeasured.....	\$10 00
For services to ascertain rental value of said property, one day... ..	10 00
One day in preparing report.....	10 00
Total.....	\$30 00

In witness whereof I have hereunto set my hand this day of , 189 .

WILLIAM H. BASS,
Referee.

(Acknowledgment.)

(NOTE.—The usual eight days' notice of hearing must be given to all parties.)

Report of Referee to Admeasure Dower.

(See text, page 132.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

To the Court:

I, the undersigned referee, duly appointed by an interlocutory judgment of this court, made and entered on the day of , 189 , to admeasure the dower right

of the plaintiff herein as the widow of _____, deceased, of the property hereinafter described, situate in the county of Fulton and State of New York, do make and render my report as follows:

First. That I took and filed the oath of office as required by law.

Second. That I did, on the _____ day of _____, 189____, meet at my office, No. _____ street, in the city of Johnstown, N. Y., to execute the trust reposed in me, as aforesaid, and was attended by _____, attorney for the plaintiff, and _____, attorney for the defendant; whereupon I did cause a survey of said premises and lands set forth in said judgment, and hereinafter more particularly described, to be made in the presence of the said parties, which said premises are described as follows: (Description); and I did cause a map of said survey, which is hereto annexed, to be made; and I do further report that I have admeasured and laid off to the said plaintiff for her dower right one-third part of the said premises, which said premises are described and bounded as follows: (Description); and that the same is particularly designated by posts and permanent monuments; and I do further report that the following items are my charges attending the said admeasurement, including my fees as said referee.

2 days' services, at \$5 per day.....	\$10 00
Cash paid to _____, as surveyor, for 1 day....	5 00
Cash paid to 2 assistants of said surveyor, \$2 per day.	4 00
Total.	<u>\$19 00</u>

In witness whereof, I have hereunto set my hand this
day of _____, 189____.

WILLIAM H. BASS,
Referee.

(Acknowledgment.)

Notice for Application for Final Judgment.

(See text, page 132.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Sir.— Take notice that I, the undersigned attorney for the plaintiff herein, will apply to this court, at a Special Term thereof, to be held in the city of Johnstown, N. Y., on the day of , 189 , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order confirming the referee's report herein, made and duly filed in the Fulton county clerk's office on the day of , 189 , and for the appointing of a referee to ascertain the amount of plaintiff's damages; and for such other and further relief as to the court seems just and proper.

Yours, etc.

FRANK L. ANDERSON,

Attorney for Plaintiff,

142 West Main Street,

Johnstown, N. Y.

To R. P. Anibal, Esq., Defendant's Attorney, Johnstown,
New York.

Order of Final Judgment for Admeasurement.

(See text, page 130.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House
in the city of Johnstown, N. Y., on the
day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

On reading and filing the report of William H. Bass, Esq., the referee appointed pursuant to the interlocutory

judgment made and entered herein on the day of , 189 , to admeasure the dower of the plaintiff, Emma J. O'Connor, in the property situated in the county of Fulton and State of New York, which said property is described in said judgment, and which report bears date on the day of , 189 , and by which report it appears, among other things, that the said referee has caused a survey to be made of the lands and premises in the said judgment particularly described; and that he caused a map thereof to be made; and that he has admeasured and laid off to the said Emma J. O'Connor, plaintiff herein, for her dower right, the one-third part of the said lands and premises, which said one-third part is herein-after described; and due notices of this motion having been given to the defendant's attorney. Now, on motion of Frank L. Anderson, attorney for plaintiff, and after hearing Clarence W. Smith, Esq., attorney for the defendant, in opposition thereto, it is

Ordered, That the said report of the said referee, and the admeasurement therein made by him be, and the same is in all things confirmed; and it is further

Ordered, That the said , plaintiff, be and she hereby is awarded during her natural life the possession of the premises described as follows, to wit: (Description), subject to the payment of all taxes, assessments and other charges accruing thereon after she so takes possession thereof; and it is further

Ordered, That the plaintiff recover thereof against the defendant \$, the amount of damages to which she is entitled to for the withholding of the dower by the defendant; and that , Esq., be and he hereby is appointed referee to ascertain the amount of the said damages; and that the plaintiff may also recover of and against the defendant, her costs of this action.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Final Judgment of Admeasurement.

(See text, page 132.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

An order of this court having been duly made and entered herein on the day of , 189 , confirming the report of the referee herein, dated the day of , 189 , awarding to the plaintiff, Emma J. O'Connor, during her natural life, the possession of the premises described as follows, to wit: (Description), subject to the payment of all taxes, assessments and other charges accruing thereon after she takes possession thereof; and the report of William H. Bass, Esq., referee, who was herein appointed referee by said order having been made and filed, by which he awards to the said plaintiff the sum of dollars as the amount of her damages for the withholding of her dower by the defendant; and the order having been duly made and entered confirming said report, and directing the payment of the said amount by the defendant, it is adjudged that the plaintiff is hereby awarded, during her natural life, the possession of the above-described premises; and that the plaintiff recover of and against the said defendant the sum of dollars, damages, and the further sum of dollars as her costs of this action as taxed at the sum of dollars, in all amounting to the sum of dollars.

C. H. BUTLER,
County Clerk,
Fulton County.

Report of Referee as to Damages.

(See text, page 127.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

To the Court:

I, the undersigned referee, duly appointed by an order of this court, made and entered herein on the day of , 189 , whereby it was referred to me to ascertain and report the amount of damages to which Emma J. O'Connor, as plaintiff herein, is entitled, for the withholding of her dower by the defendant , herein, do report as follows:

First. That before entering upon my said duties as referee, I took and filed the oath of office as prescribed by law.

Second. That on the day of , 189 , the day which was duly appointed by the notices which were given, I was duly attended at my office No. William street, in the city of Johnstown, N. Y., by Frank L. Anderson, Esq., attorney for the plaintiff, and R. P. Anibal, Esq., attorney for the defendant herein; and that I proceeded to take testimony as to the value of the rents of said property since the time of the death of , deceased, husband of , the plaintiff herein; and from said testimony I found that the value of the annual rental of said property since said time, not including anything for the value of the permanent improvements placed thereon, amounts to the sum of dollars; and I do further find that said , deceased, departed this life on the day of , 189 ; and that the plaintiff is entitled to recover the sum of dollars, being the value of one-third of the mesne profits of said property for years.

All of which is respectfully submitted.

CLARENCE W. SMITH,

Referee.

Order of Reference to Ascertain Value of Dower Right.

(See text, page 130.)

At a Special Term of the Supreme Court of the
State of New York, held in the city of Johnstown,
N. Y., on the day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

On reading and filing the report of , the referee appointed to admeasure the dower of the plaintiff in the property described in the complaint, and by an interlocutory judgment made and entered herein on the day of , 189 , by which report it appears that it is not practical to admeasure and lay off a distinct parcel of said property; and due notices of this motion having been given to the defendant's attorney. Now, on motion of Frank L. Anderson, the attorney for the plaintiff, and after hearing R. P. Anibal, Esq., attorney for the defendant, in opposition thereto, it is hereby

Ordered and decreed, That it be referred to , Esq., an attorney-at-law, of the city of Johnstown, N. Y., as referee, to ascertain the sum equal to the one-third of the rental value of said property, to be paid to the plaintiff annually during her natural life as for her dower right in said property; and it is further

Ordered, That the said referee ascertain the amount of plaintiff's damages by reason of the withholding of her dower by the defendant; and that the said referee report to this court with all convenient speed.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

(NOTE.— Notice of application as on other orders.)

Report of Referee as to Value of Dower.

(See text, page 130.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

To the Court:

I, the undersigned referee, duly appointed by an order of this court made and entered on the day of , 189 , by which it was referred to me to ascertain and report a sum equal to one-third of the rental value of the property described in this action, to be paid to the plaintiff herein as her dower; and also to ascertain the damages she has sustained by reason of the withholding of the same, do hereby report as follows:

First. That I took and filed the oath of office as prescribed by law.

Second. That I was attended at my office on the day of , 189 , after having given due notice of said hearing by Frank L. Anderson, attorney for the plaintiff, and R. P. Anibal, Esq., attorney for the defendant; and after hearing all parties concerned therein I did find that the said plaintiff is entitled to receive as her dower right annually during her natural life the sum of dollars, that being one-third of the rental value of said property; and I do further report and find that the plaintiff is entitled to recover of the defendant as damages, by reason of the withholding of the dower, the sum of dollars, being for one-third of the annual value of the mesne profits of said property since the death of , deceased, husband of , the plaintiff herein, to the time of the commencement of this action, not includ-

ing the use of any permanent improvements placed thereon.

All of which is respectfully submitted.

CLARENCE W. SMITH,

Referee.

(NOTE.—Notice of the hearing of the reference and the application of the confirmation of the referee's report after final judgment, is the same as shown before in like proceedings.)

Order Confirming Referee's Report.

(See text, page 130.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House
in the city of Johnstown, N. Y., on the
day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

On reading and filing the report of Clarence W. Smith, Esq., the referee appointed by an order of this court, made and entered on the day of , 189 ; and due notices of this motion having been given to the defendant's attorney. Now, on motion of Frank L. Anderson, attorney for the plaintiff, and after hearing R. P. Anibal, attorney for the defendant, in opposition thereto, it is

Ordered, That the report of the said referee be and the same is in all things confirmed, and that the sum of dollars, that being the amount ascertained by said report as the sum equal to one-third of the rental value of the property described in the complaint in this action, be paid to the plaintiff annually, during her natural life, as her

dower in said property; and that the said sum so to be paid be and remain a charge upon the said property during her natural life; and that the plaintiff recover in this action from the defendants the amount of her damages for the withholding of her dower as found by said referee, to wit, the sum of dollars, and her costs of this action; and that the plaintiff have judgment accordingly.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Final Judgment in Action for Dower.

(See text, page 130.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To the Supreme Court:

It is adjudged, pursuant to an order of this court, made and entered on the day of , 189 , that the sum of dollars, that being the amount equal to one-third of the rental value of the property described in the complaint in this action to be paid to the plaintiff annually during her natural life as for her dower in the said property; and that the said sums so to be paid be and remain a charge upon said property during her natural life; and that the plaintiff also recover from the defendant the amount of her damages for the withholding of the dower, to wit, the sum of dollars, with the sum of dollars, as costs of this action; and that execution issue therefor.

C. H. BUTLER,
County Clerk,
Fulton County.

Consent to Accept Gross Sum in Satisfaction of Dower.

(See text, page 129.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

I, Emma J. O'Connor, the plaintiff in the above-entitled action, do hereby consent to accept a gross sum in full satisfaction and discharge of my right of dower in the real property described in the complaint in the above-entitled action.

In witness whereof, I have hereunto set my hand this
day of , 189 .

..... Sig.

(Acknowledgment.)

(NOTE.—This consent must be filed with the clerk of the county wherein the said plaintiff resides, before entry of judgment can be made, where default is made or before the commencement of trial where issue is joined; and a copy thereof, with notices, must be served upon each of the adverse parties to the action who has appeared, or who has appeared since the consent was filed.)

Affidavit of Leave to Pay.

(See text, page 130.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

STATE OF NEW YORK, }
County of Fulton, } ss.:

, being duly sworn, says that he is one of the defendants named in the foregoing action; that the said action was brought to recover the dower right in and to the following described property: (Description); and deponent further says, that the plaintiff herein has filed with the clerk of the county of Fulton, in which county

the said case is triable, her consent in writing duly acknowledged, to accept a gross sum in full satisfaction in discharge of her dower right in the premises described hereinbefore; and has served upon deponent a copy of said consent, a copy of which is hereto annexed; and deponent further says that he desires leave of this court to pay said gross sum to the plaintiff herein.

(Jurat.)

..... Sig.

Notice of Motion to Apply for Order Granting Leave to Pay.

(See text, page 130.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Sir.—Take notice that a motion will be made at a Special Term of this court, to be held in the city of Johnstown, N. Y., on the day of , 189 , at the opening of the court thereof, or as soon thereafter as counsel can be heard, for an order granting leave to the defendant to pay to the said plaintiff a gross sum in full satisfaction of her dower right in the property described in said complaint, said motion being made upon the affidavits hereto annexed, and also upon the written consent of the plaintiff to accept a gross sum in lieu thereof of her dower right, which said consent is also hereto annexed; and for such other and further relief as to the court may be proper.

Dated at Johnstown, N. Y., this day of , 189 .

FRANK L. ANDERSON,

Plaintiff's Attorney.

Office and post-office address,

142 West Main Street,

Johnstown, N. Y.

To R. P. Anibal, Esq., defendant's attorney, Johnstown,
New York.

Order Granting Leave to Pay Gross Sum.

(See text, page 130.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House
in the city of Johnstown, N. Y., on the
day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

On reading and filing the affidavit of , verified
on the day of , 189 , one of the defendants
herein, to which is hereto annexed a copy of the consent
of the plaintiff herein to accept a gross sum in full satis-
faction of her dower right in the property described in
the complaint in this action; and due notices of this
motion having been given to the plaintiff's attorney; and
the court having herein ascertained the value of the
plaintiff's right of dower in the said property to be the
sum of dollars, now, on motion of R. P. Anibal,
Esq., attorney for the defendant, and after hearing Frank
L. Anderson, Esq., attorney for the plaintiff, in opposi-
tion thereto, it is

Ordered and directed, That the defendant pay the sum
of dollars within sixty (60) days after the ser-
vice of a copy of this order; and it is further

Ordered and directed, That the plaintiff herein give a
receipt of said amount of money so received by her, and
execute to the defendant thereupon a release of her said
dower right in said premises described in the complaint
in this action.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Interlocutory Judgment to Sell in an Action for Dower.

(See text, page 134.)

At a Special Term of the Supreme Court of the
State of New York, held in the Court House
in the city of Johnstown, N. Y., on the
day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

The consent of the plaintiff, duly executed, having been filed, by which she consented to accept a gross sum in full satisfaction in discharge of her dower right in the property described in the complaint in this action; and on application of the defendant. the court having ascertained by the report of Clarence W. Smith, Esq., the referee duly appointed for that purpose, that a distinct parcel of the property described in the complaint in this action cannot be admeasured and laid off to the plaintiff without material injury to the interests of the other parties herein, it is hereby

Ordered and directed, That said property described as follows, to wit: (Description), and the estate, right, title and interest of the parties to this suit herein, including said plaintiff's dower interest herein, be sold at public auction in the county of Fulton, where said premises are situated, by and under the direction of the said referee; and that the referee give a notice of the time and place of said sale as is required by law; and that the sale be for cash only; and that the plaintiff or any of the parties to this action may become purchasers thereto; and that the said referee pay into court the said moneys, after deducting the costs and expenses of this sale, to be apportioned and distributed by the order of this court; and it is further

Ordered, That the said referee, after completing said sale, file with the clerk of this court his report thereof, before the date of the confirmation of the said sale, and the interest of each party to this action; and every person deriving title from or through them, or any person not a party who has any interest since the filing of the judgment roll, or any person who may have any right or interest in said property, be so sold.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Referee's Report of Sale.

(See text, page 134.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

To the Court:

In pursuance of an order of this court, made in the above-entitled action on the day of , 189 , I, the undersigned referee, duly appointed by said order, do hereby respectfully report as follows:

First. That I caused a notice of the time and place of sale of the premises mentioned in said judgment, and which were directed to be sold, to be conspicuously fastened up, at least forty-two days before the sale, in three public places in the city of Johnstown, N. Y. (here name the places where the notices were so fastened up), the city where the said sale was to take place; and that I caused a copy of the said notices to be published once a week for six successive weeks in two newspapers published in the county of Fulton, to wit, the Johnstown Daily Republican, a newspaper published in the city of Johnstown, N. Y., and the Johnstown Daily Democrat, a newspaper published in the city aforesaid; and that I did on the

day of _____, 189____, at one o'clock in the afternoon, meet at the time and place as specified in said notice, to wit, at the front door of the Court House, in the city of Johnstown, N. Y., and proceeded to place and expose for sale the said premises to the highest bidder, according to said judgment; and I do further report that said land was put up for sale and was struck off to _____, for the following sum, to wit, _____ dollars, he being the highest bidder, and that being the highest sum bid therefor; and I do further report that I have received from said _____, the said purchaser, the amount required to be paid by him in cash, according to the terms of which said sale was made; and that I have deducted from said proceeds of said sale of the amount that remained in my hands the sum of _____ dollars, being the amount of my fees and expenses of said sale, of which the items are as follows: (Here state the items); and I do further report that I have paid into court the balance of said sum as directed by said order.

All of which is respectfully submitted.

CLARENCE W. SMITH,

Referee.

(NOTE.— Notices must be given.)

Final Judgment Upon Report to Sell.

(See text, page 135.)

At a Special Term of the Supreme Court of the State of New York, held at the Court House in the city of Johnstown, N. Y., on the day of _____, 189____.

Present — Hon. M. L. S., Justice.

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

This action having come on to be heard upon the report of Clarence W. Smith, Esq., the referee duly appointed

herein by an interlocutory judgment, to make sale of the premises directed to be so sold by the said judgment; and that said premises were sold on the day of , 189 , and due notice having been served upon , attorney for the defendant. Now, on motion of Frank L. Anderson, attorney for plaintiff, and after hearing R. P. Anibal, attorney for the defendant, it is

Ordered and adjudged, That the said report and the said sale be and the same is in all things confirmed; and the court having ascertained by the report of said referee as to the rights and interest of each of the parties in and to the proceedings, and of this sale; and has also ascertained what gross sum of money is equal to the value of plaintiff's dower in the net proceeds of said sale; and that the sum of dollars is equal to the value of said dower; and that the defendant , is entitled to one undivided part in the remainder of said proceeds, and the defendant , is also entitled to one undivided part of the remaining part of said proceeds; and it is further

Ordered and adjudged, That the gross sum so ascertained be paid to the plaintiff in full satisfaction of her said dower right; and that the amount of dollars be paid to , defendant herein, and that the amount of dollars be paid to , the other defendant herein; and that the said proceeds having been paid into court, said parties are entitled to receive said amounts of the county treasurer of the county of Fulton; and he is hereby ordered and directed to pay the same to them, after deducting his fees and commissions.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Judgment on Report of Sale.

(See text, page 135.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

It is adjudged, pursuant to an order of this court, made and entered herein on the day of , 189 , confirming the referee's report of sale, that the sum of dollars, that being the gross sum and value ascertained as being the dower right of the plaintiff herein, which sum plaintiff has consented to so accept in lieu of her dower, be paid to the plaintiff; and that the sum of dollars be paid to , defendant; and that the sum of dollars be paid to , defendant; and that the plaintiff have and recover from the defendant the sum of dollars, as her costs and expenses of this action.

C. H. BUTLER,
County Clerk,
Fulton County.

Order Appointing Referee to Ascertain Liens.

(See text, page .)

See precedent on page 111.

CHAPTER IV.

PART I.

FORECLOSURE OF MORTGAGE.

Two remedies.

The mortgagee has one of two remedies, either to bring an action upon the bond or to bring an action to foreclose the mortgage; they cannot be pursued concurrently without leave of the court.

Code, § 1628; *Dudley v. Third Order of St. Francis*, 138 N. Y. 451.

Action to recover.

And if an action is brought to recover any part of the debt, and final judgment obtained, no action can be maintained to foreclose unless an execution has been returned wholly or partly unsatisfied.

Code, § 1630; *Dudley v. Third Order of St. Francis*, 138 N. Y. 451; *Guilford v. Crandall*, 69 Hun, 414.

Strict foreclosure.

The statutes do not provide for a strict foreclosure, although it is allowed.

Bolles v. Duff, 43 N. Y. 469, 473.

Object of the action.

In an action to foreclose the object is to sell the property to enable the mortgagee to collect the amount due him, or to invest him with the legal title to the premises.

FORECLOSURE BY ACTION.

Jurisdiction.

The Supreme and County Courts have jurisdiction to try actions to foreclose mortgages.

Code, §§ 217 and 340.

Supreme Court.

The jurisdiction of the Supreme Court extends to all lands that lie within the State, and where a part of the lands lie outside of the State.

Union Trust Co. v. Olmstead, 102 N. Y. 729.

County Court.

The jurisdiction of the County Court only extends to lands which are, or a part thereof, situate within the county.

Strong v. Eighme, 41 How. Pr. 117.

Place of trial.

The action is triable in the county where the property or some part thereof is situate.

Code, § 982.

PARTIES.**Plaintiff.**

The mortgagee or his personal representatives.

And if the mortgage has been assigned the assignee or his personal representative.

If there is no bond, the mortgage being the only security, an assignee thereof can maintain the action.

Carpenter v. O'Dougherty, 67 Barb. 397.

But if there is a bond then the assignee cannot unless the bond is assigned him also.

17 Abb. Pr. 342.

Transfer of the mortgage.

The transfer of the mortgage does not transfer the bond.

Merritt v. Bartholick, 36 N. Y. 44; Payne v. Wilson, 74 N. Y. 348.

If the mortgage is assigned as collateral security, the assignor may maintain the action, but the assignee must be made party, either plaintiff or defendant.

Simson v. Satterlee, 6 Hun, 305.

Junior mortgagee.

A junior mortgagee may maintain an action to foreclose although the senior mortgagee has obtained a judgment.

Basche v. Purcell, 6 Hun, 518.

Heirs are not proper parties plaintiff.

The administrator of a wife of a mortgagee may maintain the action.

Weed v. Hornby, 35 Hun, 580.

If a trustee under a mortgage refuses to bring the action the bondholders may.

Davies v. N. Y. Concert Co., 41 Hun, 492.

Infants.

An infant may maintain the action by next of friend.

Code, §§ 468 and 469.

A part owner only of the mortgage can bring an action.

Batterman v. Albright, 6 N. Y. St. R. 334.

But the owner of the other part must be made defendant, and the reason why stated in the complaint.

Id.

Where there are joint owners and the doctrine of survivorship applied (such as husband and wife, etc.), the action may be brought by the survivor without joining the representatives of the other.

Jones on Mort., § 1382.

Where the assignee maintains the action the mortgagee need not be made a party.

Christie v. Herrick, 1 Barb. Chan. 254.

An executor with the power to sell and convert the property into cash, may maintain the action; also when it is necessary to pay debts.

Newton v. Stanley, 28 N. Y. 61; People ex rel. Wm.

Eagle v. Keyser, 28 N. Y. 226.

Also an administrator may bring an action to foreclose to pay debts.

Peck v. Mallams, 10 N. Y. 509.

An executor or administrator may foreclose.

McGregor v. McGregor, 35 N. Y. 218.

But a foreign executor or administrator cannot bring the action until they have taken out letters in this State.

Parsons v. Lyman, 20 N. Y. 103; Smith v. Tiffany, 16 Hun, 552.

Joint mortgagees.

Joint mortgagees should be joined as plaintiffs.

Patton v. Murray, 6 Paige Chan. 474.

Mortgages as a pledge.

Owners of a pledged mortgage may foreclose, making the pledge a party.

Simson v. Satterlee, 64 N. Y. 657; Hoyt v. Martense, 16 N. Y. 231.

Holders of a mortgage as collateral may foreclose.

Bard v. Poole, 12 N. Y. 495.

Equitable assignee.

A purchaser at a defective sale becomes equitably entitled to the mortgage, and may foreclose *de movo*.

Bolles v. Duff, 43 N. Y. 469; Robinson v. Ryan, 25 N. Y. 320; Franklyn v. Haywood, 61 How. Pr. 43.

A person who advances money to pay off a mortgage or loans money on the mortgage becomes an equitable assignee, and entitled to foreclosure.

Paterson v. Birdsall, 64 N. Y. 294; Miller v. Winchell, 70 N. Y. 437.

An owner by subrogation may foreclose.

Marshall v. Davis, 78 N. Y. 415.

A surety who has assumed the mortgage may foreclose the same.

Johnson v. Zink, 51 N. Y. 333.

An assignee *pendente lite* may continue the action already commenced.

Mills v. Hoag, 7 Paige, 18.

Administrator's successor.

Successors in office of an administrator may foreclose.

Renaud v. Conselyen, 4 Abb. Pr. 280.

Persons in an official capacity.

Persons in their official capacity or their successors in office may foreclose.

Lyon v. Lyon, 67 N. Y. 250.

Defendants.

Any person who is liable to the plaintiff for the payment of the debt may be made a defendant in the action.

Code, § 1627; Campbell v. Smith, 71 N. Y. 26; Comstock v. Drohan, 71 N. Y. 9; Parkinson v. Sherman, 74 N. Y. 88; Frank v. Davis, 135 N. Y. 275; Shearer v. Field, 6 Misc. 189; Morrissey v. Leddy, 11 Civ. Pro. Rep. 438; Thayer v. Marsh, 11 Hun, 501; Fowler v. Wood, 78 Hun, 304.

A junior mortgagee is a necessary party.

Mut. Life. Ins. Co. v. Drake, 87 N. Y. 257.

A remainderman is a necessary party.

Leggett v. Mut. Life Ins. Co., 64 Barb. 23.

A mortgagor who has conveyed is not necessary unless he is liable for the debt.

Walton v. James, 11 W. D. 508.

A mortgagor whose equity of redemption has been sold on execution and the time to redeem has not elapsed, is a necessary party.

Hallock v. Smith, 4 Johns. Chan. 649.

The wife of the mortgagor who has joined is necessary defendant.

Mills v. Van Voorhees, 20 N. Y. 412.

If the mortgage has been assigned as security, the assignor is necessary defendant, and also an assignee for the benefit of creditors.

Bard v. Poole, 12 N. Y. 495; Kittle v. Van Dyck, 1 Sand. Chan. 76.

The guarantor of the mortgage debt may be made a defendant.

Vanderbilt v. Schreyer, 91 N. Y. 392.

And the personal representative of the mortgagor and the guarantor.

Glacius v. Fogel, 88 N. Y. 434.

But not the heirs or devisees.

A prior mortgagor is a proper but not necessary party.

Smith v. Davis, 4 Civ. Pro. Rep. 158.

One claiming a right prior to the mortgage should be made defendant in order to settle his right and amount due.

Brown v. Valkening, 64 N. Y. 76.

The mortgagor and obligor should be defendants.

Thorn v. Newby, 59 How. Pr. 120.

Prior incumbrances are not necessary parties, but the plaintiff may make them so, and state in his complaint

their relation, and ask that their lien be paid out of the proceeds.

Emigrant Ind. Sav. Bank v. Goldman, 75 N. Y. 127.

All parties entitled to the equity of redemption, or interested in the estate, or those having liens thereon, should be made parties defendant.

Hall v. Nelson, 23 Barb. 88; Morris v. Wheeler, 45 N. Y. 708; Miner v. Beekman, 50 N. Y. 337.

This includes the heirs of the mortgagee, his devisees, assignees, personal representatives, the tenants for life courtesy, dower, reversioners and remaindermen, and any contingent interest in the equity of redemption, and persons interested in the proceeds.

Dodd v. Neilson, 90 N. Y. 243; Nodine v. Greenfield, 17 Paige, 544; Denton v. Nanny, 8 Barb. 618.

If other parties become entitled to the premises before the decree is made, they should be made parties.

Giles v. Solomon, 10 Abb. Pr. (N. S.) 97.

In the foreclosure of a mortgage given by a trustee of a deceased party, beneficiaries under the will and the heirs-at-law must be made parties.

Philips v. Wilcox, 12 Misc. 382.

Those against whom an estoppel is claimed are necessary parties to foreclose.

Lyon v. Morgan, 143 N. Y. 505.

An assignee for the benefit of creditors should be made a party as such.

Landon v. Townsend, 112 N. Y. 93.

If junior incumbrancers are not made parties the foreclosure is void as to them.

Reynolds v. Parks, 53 N. Y. 36.

A purchaser at a tax sale must be made a party.

Chard v. Holt, 136 N. Y. 30.

Prior incumbrancers cannot be compelled to liquidate their claim unless they litigate or default under a complaint testing their right.

Goebel v. Iffa, 111 N. Y. 170.

A mortgagor retaining some part, or a tenant in common by descent or grant, is a necessary party defendant.

Cornell v. Prescott, 2 Barb. 16.

Vendor and vendee under a land contract are necessary defendants.

Crooke v. O'Higgins, 14 How. Pr. 154.

Purchasers of the equity of redemption are necessary defendants.

Raynor v. Selmes, 52 N. Y. 579.

Owner of equity of redemption.

The owner of the equity of redemption by whatever title is a necessary party defendant.

Winslow v. Clark, 47 N. Y. 261.

Owner.

The owner of the premises is also necessary.

Miner v. Backman, 50 N. Y. 337.

Wife.

A wife not executing a purchase money mortgage is a necessary defendant.

Mills v. Van Voorhies, 20 N. Y. 412.

Heirs of the mortgagor, or of the equity of redemption, are necessary defendants unless the property has been sold.

McKenzie v. Alster, 64 How. Pr. 388.

Trustees are necessary defendants.

Bard v. Poole, 12 N. Y. 495.

Cestui qui trust and beneficiaries are necessary defendants.

Dodd v. Neilson, 90 N. Y. 243-247; Wiltsie on Mort. Fore. § 148, contra.

Remaindermen and reversioners are necessary parties defendants.

Brevort v. Brevort, 70 N. Y. 136.

All incompetent persons having any interest or title in the property are necessary defendants.

Prentiss v. Cornell, 31 Hun, 167.

Corporations by their corporate name who have any interest, are necessary parties.

People's Bank v. Hamilton Mfg. Co., 10 Paige Ch. 481.

Tenants and occupants under continuing leases and rights, are necessary parties defendants.

Globe Marble Mills Co. v. Quinn, 76 N. Y. 23.

Subsequent incumbrancers are necessary defendants.

Gage v. Brewster, 31 N. Y. 218.

Subsequent judgment creditors with a specific lien are necessary defendants.

Verdin v. Slocum, 71 N. Y. 345.

Holders of a mechanic's lien or the assignee of the same, are necessary parties.

Payne v. Wilson, 74 N. Y. 348; Winslow v. McCall, 32 Barb. 241.

Executors or administrators of a subsequent lienor or claimant are necessary defendants.

Lockman v. Riley, 95 N. Y. 64.

Municipal corporations, boards of supervisors, controllers and purchasers at tax sales, are necessary parties defendants.

Becker v. Howard, 66 N. Y. 5-8.

The assignor who has guaranteed the mortgage or has assigned it as collateral, should be made defendant.

Littauer v. Goldman, 72 N. Y. 506; Union College v. Wheeler, 61 N. Y. 88.

When one of several mortgagees commences an action, the other mortgagees are necessary defendants.

Decker v. Boice, 83 N. Y. 215.

The mortgagee or the owner of the mortgage, and the mortgagor, and those who have acquired rights under him, are the only necessary parties to the foreclosure.

Emigrant Industrial Sav. Bank v. Goldman, 75 N. Y. 127.

But all parties who have liens on the equity of redemption subsequent to the mortgage, and junior mortgagees and their personal representatives, are necessary parties within the rule.

Morris v. Wheeler, 45 N. Y. 708.

And the only safe course is to bring all persons whatever their interest may be, into the proceedings, setting forth their status so as to effectually conclude their rights.

PROCEEDINGS.

Appearances.

Having ascertained that all the defendants are legally before the court, which must be done before their interests can be foreclosed by the judgment, it is well to see that there are proper appearances, or that a legal and complete service in all parties has been had.

As to service and defaults or appearances, the proceedings are the same as in other actions.

Jurisdiction.

The court cannot amend or supply anything to confer jurisdiction.

Hallett v. Righten and Another, 13 How. Pr. 43.

Jurisdictional facts must be set forth and must exist.

Fiske v. Anderson, 33 Barb. 71.

Voluntary appearance.

A voluntary appearance is sufficient.

Code, § 424.

Summons invalid.

Summons giving the wrong Christian name is invalid.

Draper v. Salisbury, 11 Misc. 573.

Substituted service.

Substituted service of summons can be made as prescribed in

Code, §§ 435 to 439, both inclusive.

Continental Bank v. Thurber, 74 Hun, 632.

Summons may be served by publication, the statute being strictly complied with.

Code, §§ 434, 445; Laws 1889, ch. 195; Hallet v. Righten and Another, 13 How. Pr. 43; Carleton v. Carleton, 85 N. Y. 313; Seiler v. Wilson, 43 Hun, 629; Jerome v. Flagg, 48 Hun, 351; Orr v. Currie, 14 Misc. 74; Paget v. Stevens, 143 N. Y. 172.

Infants defendants.

Infant defendants must appear through a guardian ad litem, and all statutory requirements as to service on infant must be strictly followed.

Ingersoll v. Mangram, 84 N. Y. 622.

The appointment of guardian ad litem before service on infant is a fatal defect.

Id.

Guardian having adverse interest cannot act.

Roarty v. McDermott, 146 N. Y. 296.

An appearance by an attorney of a party is binding on the defendant, though he has not been served and the attorney is not authorized.

Brown v. Nichols, 42 N. Y. 26.

But this is doubted in

Sperry et al. v. Reynolds, 65 N. Y. 183; *Ferguson v. Crawford*, 70 N. Y. 255.

But defendant can show that the notice was a forgery, or any other fact invalidating notice itself.

Ferguson v. Crawford, 70 N. Y. 253.

Irregularities.

Appearance by a party cures any irregularity in service.

Washbon v. Cope, 144 N. Y. 287.

Parties may be proceeded against as unknown under Code, § 451.

Death of Parties.

If the plaintiff or defendant die during publication, jurisdiction is not acquired.

Reilly v. Hart, 130 N. Y. 625.

If a defendant who owns an interest in the property dies pending foreclosure, his heirs or devisees must be brought in as parties, or the judgment will not affect his interest.

Stevens v. Humphrey, 141 N. Y. 586.

PLEADINGS.

Lis pendens.

A notice of the pendency of the action must be filed at least twenty days before a final judgment directing a sale, and in addition to the facts stated in said notice, as prescribed in section 1670, the notice must give the date of

the mortgage, the parties thereto and the place of recording it.

Code, § 1631, rule 60.

The complaint.

The complaint must set out the facts showing the right of the plaintiff to maintain the action, and that there is a cause of action against the defendants. It must also state the interest of the infants if there are any, and if said interest is paramount or subsequent to that of plaintiff.

Aldrich v. Lapham, 6 How. Pr. 129.

General allegation.

A general allegation that certain of the defendants have, or claim, some interest in, or lien upon the premises, which interest or lien is subsequent to the plaintiff's mortgage, is sufficient to state, and constitutes a cause of action against such defendants.

Drury v. Clark, 16 How. Pr. 424.

Only one action pending.

While an action is pending, or after final judgment, no other action shall be commenced or maintained without leave of the court in which the former action was brought.

Code, § 1628; Equitable Life Ins. Co. v. Stevens, 63 N.

Y. 341; Probasco v. The Angels Am. Co., 81 Hun,

389; Cochran v. The Am. Opera Co., 30 N. Y. St. R.

13.

Therefore, the complaint must state whether any other action has been brought to recover any part of the debt, and if so, whether any part has been collected.

Code, § 1629; Lovett v. The German Ref. Church, 12

Barb. 67; Morrissey v. Leddy, 11 Civ. Pro. 438.

On application to bring an action the plaintiff must show that an execution has been issued on the former judgment and has been returned wholly or partly unsatisfied.

Code, § 1630; Guilford v. Crandall, 69 Hun, 414; Dudley

v. St. Francis, 138 N. Y. 451.

What the complaint should allege.

The complaint should allege the execution and delivery and a full description, give date, names, terms and con-

ditions, when and where recorded, the amount for which it was given to secure and when due, the default and breaches of its covenants, the description, and if not brought by the mortgagee the right and title of the plaintiff; if a bond accompanies it, its conditions and default; if given to indemnify the plaintiff he must state that he was compelled to pay.

Davis v. N. Y. Concert Co., 41 Hun, 492.

Demand.

The demand for judgment must be full and explicit.

Answer.

The defendants may controvert any matter alleged in the complaint.

Pleading tender.

Defendants may plead payment or tender, and tender must be pleaded.

Kortright v. Cady, 21 N. Y. 343; Sedenberg v. Ely, 90 N. Y. 257; Breunich v. Weselman, 100 N. Y. 609.

Counterclaim.

The defendant may plead any counterclaim or set-off he has.

Seligman v. Dudley, 14 Hun, 186.

Set-off.

An action on a mortgage given as security for a joint bond given by the mortgagor and a surety, in which a personal judgment is demanded against both, a debt due the mortgagor from plaintiff can be offset.

Bathgate v. Haskin, 59 N. Y. 533.

An action against an obligor.

An obligor on the bond secured by the mortgage, against whom a deficiency judgment is asked, can set up any other cause of action he has against the plaintiff existing at the commencement of the action.

Hunt v. Chapman, 51 N. Y. 555.

Damages as an offset.

Damages by reason of a breach of a contract as a part of the same transaction between the mortgagor and mortgagee may be set off.

Sandford v. Travers, 40 N. Y. 140.

Proceedings by a senior mortgagee made a party.

Where the plaintiff has made senior mortgagees parties, and asked an adjudication upon their mortgages, any of the defendants may, by answer, allege the facts essential to the maintenance of an action to foreclose their mortgages, and demand the usual judgment and sale, and serve their answer on the attorneys for plaintiff and other defendants, and obtain judgment of foreclosure and sale as if he had brought a cross action for that purpose.

Metropolitan Trust Co. v. Tonawanda, etc., R. R. Co.,
43 Hun, 521; id., 106 N. Y. 673.

And it may be stated generally that whatever will serve to show that the plaintiff has no right to bring the action and enforce the same, may be pleaded as such, as lack of title or interest, non-liability of defendant for the debt, or of the property for its payment; want or failure, or illegality of consideration for the debt; fraud, duress, usury, set-off or counterclaim, Statute of Limitations, payment release; and these defenses should be pleaded.

Aikin v. Morris, 2 Barb. Ch. 140; Lane v. Losee, 2 Barb.
56; Jones on Mort. ch. 26.

Proceedings.

In case of default judgment can only be taken on application to the court, and a reference must be had.

Order of reference on default.

If the defendants fail to answer, or if the plaintiff's rights as stated in the complaint are admitted, the plaintiff may have an order of reference to compute the amount due the plaintiff, and to such of the defendants as have prior incumbrances to examine and report if the land can be sold in parcels, if the whole amount of the mortgage is not due.

Rule 60; Code, §§ 1636, 1637.

Infant defendants.

If any of the defendants are infants and have put in a general answer by guardian, or if any of the defendants are absentees, the referee should take proof of the facts and circumstances stated in the complaint, and as to any

payments, and compute the amount due, before the application for judgment of foreclosure and sale.

Rule 60.

Application for judgment on default.

Where no answer is put in by the defendants or an answer that does not deny any material fact of the complaint, the plaintiff after the cause is ready for trial as to all the defendants may apply for judgment at any Special Term upon due notice to such as have appeared, and plaintiff need not put the cause on the calendar.

Rule 60.

Notice of reference on demand.

If a defendant has appeared generally but has made default in pleading, or if he has served upon the plaintiff's attorney at any time before application for judgment a written demand of notice of reference at least eight days' notice of the time and place of the application must be given such defendant.

Code, § 1219.

What plaintiff must show on application for judgment.

When the plaintiff moves for judgment he must show whether any of the defendants not appearing are absentees; if so, he must produce the referee's report, and he must also show by affidavit or the clerk's certificate that a proper notice of the pendency of the action was duly filed.

General rule 60.

Report of referee submitted to the court.

The report of the referee should always be submitted to the court for confirmation.

General rule 30; *Citizens' Sav. Bank v. Bauer*, 49 Hun, 238.

What the report must show.

The report of the referee should show the facts upon which his conclusions are based.

Wolcott v. Weaver, 3 How. Pr. 159.

A report made upon default in this action is not within section 763 of the Code.

Smith v. Joyce, 3 N. Y. St. R. 560.

Substitution of parties.

Upon the death of either party the personal representatives must be substituted.

Id.

All official searches must be filed with the judgment roll.

General rule 64.

Selection of referee.

The referee can only be selected by the court.

General rule 61.

Filing of the report and notice.

The referee's report should be filed and notice of the filing given to the attorneys of all parties who have appeared or demanded notice.

Chamberlain v. Dempsey, 36 N. Y. 144.

New hearing before the referee.

Any party aggrieved may obtain redress by motion for a new hearing based upon affidavits.

Code, § 1232.

Trial.

The action is an equity action, and is triable by the court unless issues are ordered settled for trial by jury.

Code, § 668.

Notice of trial.

Notice of trial should be given to all persons who have appeared.

Code, § 1634.

Payment.

Payment to the referee is not payment into court.

Becker v. Boon, 61 N. Y. 317.

Tender by junior mortgagee.

A junior mortgagee who is made a party may tender the plaintiff the amount due, with costs, and obtain an assignment of the mortgage in suit on demand, and if refused, by an order of the court, and the court may in

its discretion discontinue the action without costs against the plaintiff.

Twombly v. Cassidy, 82 N. Y. 155.

Receiver.

In a proper case, upon application, the court will appoint a receiver of the rents and profits, and stay waste.

Code, §§ 713, 1681; Hollenbeck v. Donnell, 94 N. Y. 342; Burlingame v. Parce, 12 Hun, 144; Wyckoff v. Scofield, 98 N. Y. 475; Rider v. Bagley, 84 N. Y. 461; Brady v. Waldron, 2 John. Ch. 148.

Receiver on application of a purchaser.

Mutual Life Ins. Co. v. Bigher, 79 N. Y. 568.

Judgment.

The final judgment must direct the sale of the property, or so much thereof as will satisfy the debt and the expenses and costs of sale.

Code, § 1632; Morris v. Morrange, 38 N. Y. 172; Dudley v. St. Francis, 138 N. Y. 451; Ranney v. Peyser, 20 Hun, 11; House v. Lockwood, 1 N. Y. St. R. 196; Hatfield v. Malcolm, 23 Civ. Pro. Rep. 197.

Judgment against the surety.

Any person who is liable to the plaintiff for the payment of the debt secured, if he has been made a defendant and personally served, the judgment may direct payment by him of the balance unpaid after the property is exhausted.

Code, § 1627; Comstock v. Drohan, 71 N. Y. 9-26; Frank v. Davis, 135 N. Y. 275; Thayer v. Marsh, 11 Hun, 501; Fowler v. Wood, 78 Hun, 304.

Description in the judgment.

The judgment ordering a sale should contain an exact description of the property.

Gen. Rule 61.

What the judgment must direct.

The judgment must direct that the premises or so much thereof as is necessary to pay the debt and expenses of the sale, including the taxes, assessments, water rents, etc., as are liens, and the costs of the action, be sold by the sheriff or referee.

General Rule 61; Code, § 1676.

Also, whether it is to be sold in one piece or in separate parcels.

Gen. Rule 61.

Also, that out of the proceeds the expenses, costs and debt be paid, and that the party who sells take his receipts therefor, and file the same with his report.

Gen. Rule 61.

Also, that the purchaser be let into possession on production of the deed.

Gen. Rule 61.

Also, who can become purchasers, and that the party selling execute a deed therefor.

Gen. Rule 61.

The court may direct that the property be sold subject to the taxes or assessments.

Day v. Town of New Lots, 107 N. Y. 148.

Where there are two or more parcels, and the situation of the property and the nature and amount of subsequent incumbrances have been brought to the notice of the court, it may authorize a sale to pay all the incumbrances.

Andrews v. O'Mahany, 112 N. Y. 567.

The referee to sell should be named in the judgment.

Union Trust Co. v. Olmstead, 102 N. Y. 729.

The mortgagor can be ordered by the court to execute a conveyance of the premises if it is necessary to complete the sale.

Id.

Where entered.

The judgment must be entered in each county where the lands are situate.

Code, § 1677.

Appeal.

An appeal can be taken from a judgment to sell.

Morris v. Morange, 38 N. Y. 172.

Who can make the order.

The order for a judgment can be made by any judge.

Chamberlain v. Dempsey, 36 N. Y. 144.

Judgment for deficiency.

The order should contain directions as to the entering of a judgment for a deficiency.

Moore v. Show, 15 Hun, 428.

And no judgment for deficiency can be entered unless so directed.

Day v. Johnson, 4 W. D. 237; Mutual Life Ins. Co. v. Hoyt, 15 W. D. 489.

Judgment should not be rendered for deficiency against an assignee for the benefit of creditors but against the assignor.

Payne v. Smith, 28 Hun, 104.

But it may be rendered for deficiency against the personal representatives of the mortgagor.

Galicus v. Fogel, 88 N. Y. 434.

And against a guarantor of payment or for payment by foreclosure and sale, but not against a surety for a particular debtor.

Ofpur v. Burchell, 19 Alb. L. J. 57; Vanderbilt v. Schreyer, 91 N. Y. 392; Hencker v. James, 16 W. D. 33.

A party liable for the debt already secured, who is made a party and has appeared or been regularly served, judgment for deficiency may be rendered against him.

Code, § 1627.

Non-resident.

A personal judgment cannot be taken against a non-resident who has not appeared, or was not personally served within the State.

Schwinger v. Hickok, 53 N. Y. 280.

When the debt is not all due.

If the debt is not all due and the property is so situated that it can be sold in parcels, the judgment must direct that no more be sold than to satisfy the debt and costs and expenses, and that the residue may be sold upon the subsequent default, the plaintiff may obtain an order as often as default happens.

Code, § 1636.

But if the premises are so situated that a sale will be most beneficial for all parties, the final judgment must direct that the whole property be sold, the whole debt be paid deducting unearned interest, or that the balance be invested for the benefit of the plaintiff to be paid to him as it becomes due.

Code, § 1637.

If only part is due at the commencement of the action, and other sums become due before judgment, the court may direct judgment for the amount.

Asndorf v. Meyer, 8 Daly, 278.

Liens.

All liens subsequent to the mortgage must be taken into consideration in the judgment and their equities taken care of.

Livingston v. Mildrun, 19 N. Y. 440.

If a subsequent incumbrancer is not made a party, the sale is valid, and the remedy is by action to be permitted to come in and redeem.

Salmon v. Allen, 11 Hun, 29.

Prior incumbrances.

The judgment does not effect prior incumbrances unless attacked upon some equitable ground.

Clements v. Griswold, 46 Hun, 377.

Order of sale.

The general rule is, that when there are successive grantees or mortgagees of portions of the premises, the property must be sold in the inverse order of alienation. But this rule is one of equity and yields to circumstances.

Bernhardt v. Lymburner, 85 N. Y. 172; Steere v. Childs, 15 Hun, 511; Bowne v. Lynde, 91 N. Y. 92; Welling v. Ryerson, 94 N. Y. 98.

A party desiring to have the property sold in a particular order should have a clause to that effect inserted in the decree.

Vandercook v. Cohoes Sav. Inst., 5 Hun, 641.

Prior mortgagee.

A prior mortgagee who has been made a party to an action to foreclose a junior mortgage may, in his answer,

set up his prior mortgage and ask to have it paid before the payment of plaintiff's mortgage, and the court may so direct.

Doctor v. Smith, 16 Hun, 245; but see Payne v. Grant, 23 Hun, 134.

Tender of amount due.

In an action for a part of the debt due, and the balance is not due, the complaint must be dismissed, without costs to plaintiff, upon the defendant paying into the court at any time before final judgment for sale the amount due, and costs.

Code, § 1634.

Payment into court.

If, after judgment of sale, and before sale, the defendant pays into court the amount due, and interest and costs, and the expenses of the proceedings to sell, the judgment must be stayed, but upon subsequent default may direct the enforcement of the judgment to collect the sum then due.

Code, § 1635.

If there is a dispute as to the amount of costs, the defendant may offer to pay the amount due and such costs as he thinks proper, and if the plaintiff refuses to accept the offer the defendant may apply to the court on motion for leave to pay the amount due, and such costs as the court may allow; and the court should permit the payment fixing the costs, and directing that upon payment being made the action should be discontinued or proceeding therein stayed.

Boston v. Cleveland, 16 How. Pr. 364; Bank of Mobile, v. Phoenix Ins. Co., 8 Civ. Pro. 218, note; Thomas v. Harmon, 122 N. Y. 84.

Effect of tender.

Tender of the amount of the mortgage, and costs, if any, discharges the lien of the mortgage.

Kortright v. Cady, 21 N. Y. 343.

Sales.

The mode of conducting the sale in mortgage foreclosure is prescribed in section 1678 of the Code, and is the

same as in partition sales, for which proceedings see ante, pages 72 to 77.

The sale is by a referee appointed in the final judgment.
General rule 61.

As to sales in New York and Brooklyn see ante, page 73.
General rule 62.

The referee acts under the directions of the court, and may apply thereto from time to time for instructions.
Easton v. Pickersgill, 55 N. Y. 310.

And the referee must proceed with all due diligence, and may adjourn from time to time.
King v. Platt, 37 N. Y. 155.

All postponements should be advertised.
Code, § 1678.

But a failure to advertise is not jurisdictional.
Bickstein v. Schultz, 45 Hun, 191.

The referee must perform his duties personally.

Order of sale.

If the order in which the property should be sold is not stated in the judgment, any party interested may apply to the court either at a Trial or at Special Term on notice to all parties, for an order directing the referee in what order to sell.

Vandercook v. Cohoes Sav. Inst., 5 Hun, 641; Welling v. Ryerson, 94 N. Y. 98.

No order to stay a sale shall be granted by a judge out of court except upon notice of at least two days to the plaintiff's attorney.

General rule 67.

Conveyance.

The referee should make a deed of conveyance to the purchaser upon his complying with the terms of the sale.
Recording the mortgage.

If it does not appear that the mortgage or assignment thereof is lost, they must be recorded in full by the plaintiff in the county or counties where the lands sold are situate before the deed is executed.

General rule 63.

Effect of the conveyance.

The conveyance is valid as against all parties to the action, and those claiming through or under them.

Code, § 1632; Rector, etc., of Christ Church v. Mack, 93 N. Y. 488; Rathbun v. Hooney, 58 N. Y. 463; Reynolds v. Park, 53 N.Y. 36.

A purchaser at a tax sale not effected.

Becker v. Howard, 66 N. Y. 6.

Dower in land not effected.

If the wife of the mortgagor, although she join in the mortgage, is not made a party, her dower is not foreclosed.

Ross v. Boardman, 22 Hun, 527.

Report of referee and confirmation.

Within five days all moneys must be paid by the referee to those entitled, taking receipt therefor to be filed, and if any surplus remain in his hands he should pay it to Chamberlain in the city of New York, and to the County Treasurer in other counties, unless otherwise specially directed.

General rules 61 and 68.

Report of referee to sell.

The referee should at once make and file his report, setting forth his proceedings thereunder as to the time and place and manner of the sale, the names of the purchasers, and amounts bid and paid, and the disposition of the moneys, annexing to his report his vouchers; also of the making of the conveyances; also if there is a deficiency, and the amount.

General rule 61.

Notice of confirmation.

Notice of such filing should be given all persons interested, and for a confirmation of the report.

Peck v. Knickerbocker Ice Co., 18 Hun, 183; Farmers' L. & T. Co. v. B. & M. Tel. Co., 11 Civ. Pro. Rep. 307.

Proceedings after sale.

After the referee has paid:

First. The expenses of the sale.

Second. Such other expenses as the judgment directs him to pay.

Third. The taxes and all costs and expenses of the action.

Fourth. What is due the debtor.

The surplus must be paid to the County Treasurer or the Chamberlain of the city of New York, if the sale is held in said city.

If there is a deficiency the referee is so to report, upon which report a notice must be given of the filing of the report and of the entry of an order confirming the report, and if, within eight days no exceptions are filed to the confirmation of the report judgment may be entered by the plaintiff for the deficiency. If objections are filed the same will come on for hearing at Special Term on the usual eight days' notice.

Rules 30, 37.

If the property is sold on a prior mortgage, and the surplus has been applied upon a second to the extent of the surplus, and a deficiency still remains, the second mortgagee may enter judgment for deficiency without going through a form of sale upon his mortgage.

Siewert v. Hamel, 33 Hun, 44.

A purchaser who assumes the payment of the mortgage is liable for the deficiency.

Thayer v. Marsh, 11 Hun, 501; *Comstock v. Drohan*, 71 N. Y. 9.

A guarantor of a mortgage is liable for deficiency.

Vanderbilt v. Schreyer, 91 N. Y. 392.

Where defendants are liable, some as principals and others as sureties, the judgment should state the order in which they are liable.

Weed v. Calkins, 24 Hun, 582.

Judgment must ask for deficiency and fix the liabilities.

French v. New, 20 Barb. 484; *Wager v. Link*, 134 N. Y. 122.

No judgment for deficiency can be entered till after sale and confirmation of referee's report.

Loeb v. Wellis, 22 Hun, 508; Dr. Agreda v. Mantell, 1 Abb. Pr. 130.

A deficiency judgment may be entered against any party who is liable to the plaintiff for the payment of the debt secured, who has appeared or been properly served, if there has been a sale of the property to pay a prior mortgage, and the moneys applied to said mortgage, and the proceeds are not sufficient to satisfy said debt.

Frank v. Davis, 29 Abb. N. C. 294.

There must be a bond or covenant to pay, or there can be no judgment for deficiency.

Mack v. Austin, 95 N. Y. 513.

Surplus.

All surplus moneys that remain in the hands of the party receiving the same after paying the expenses as heretofore stated, and satisfying the mortgage debt and costs, must be paid into the court within ten days, for the use of the person or persons entitled thereto.

Code, § 1633.

If said money remains in court for three months the court must, if no application has been made therefor, and may if application has been made, direct the same to be invested at interest for the benefit of the parties entitled thereto, to be paid upon the direction of the court.

Code, § 1633.

Payment into court.

In foreclosure by advertisement the money must be paid into the Supreme Court, and on foreclosure of mortgage executed by a decedent in his lifetime then into the Surrogate's Court.

Code, §§ 2404 and 2798.

Surplus moneys belong to the owner of the equity of redemption, unless claims are filed and they are ordered paid on those claims.

Horn v. Town of New Lots, 83 N. Y. 100; Day v. Town of New Lots, 107 N. Y. 148.

Order of reference.

Any person who has a lien on the mortgaged premises at the time of the sale may obtain an order of reference to ascertain the amount of his lien, and the priority thereof.

Rule 64.

Filing notice with the clerk.

In order to obtain such order such person must file with the clerk where the report of sale is filed a notice stating that he is entitled to such surplus or some part thereof, and the nature and extent of his lien or claim.

Rule 64.

Referee, selection and report.

The referee must be selected by the court, and must ascertain and report what claims, their amounts, and the priorities of the same, which said order must be confirmed by the court.

Rule 64.

Upon the confirmation of said referee's report the court may make such order as may be just to all parties.

Rule 64.

Who may file a claim.

Any person who has a lien against the land which he could enforce in law or equity may file his claim for the surplus.

Crombie v. Rosenstock, 19 Abb. N. C. 312.

Notice.

The owner of the equity of redemption, and every party who appeared in the cause, and every person who has filed a notice, must be notified of the application for a reference, and of all subsequent proceedings.

Rule 64.

How served.

Said notice shall be served upon the attorney of said parties if they have appeared by attorney, and if they have not so appeared then by depositing the same in the post office directed to his said place of business.

Rule 64.

The proceedings must be entitled in the court where the action was had.

Fliess v. Buckley, 90 N. Y. 286.

Notice of application.

Application for the appointment of a referee is made at a Special Term upon the usual notice of eight days.

Rule 64.

Application for the manner in which notice should be served upon the owner of the equity of redemption should be first made to the court.

Rule 64.

What must be shown.

The party moving for the order of reference must show by affidavit what unsatisfied liens appear by the official searches, and whether any other or what other unsatisfied liens are known by him to exist, and notice must be given to all in such a manner as the court shall direct.

Rule 64.

Contents of the order.

The order should contain directions in regard to the notice of the hearing before the referee, and if no directions are given notice must be given as for notice of trial the same as other hearings before a referee. The proceedings before the referee are the same as a reference under section 1015 of the Code, to take evidence and report.

Rule 64; Code, §§ 1015, 1016.

And all persons who were entitled to notice of the application for reference are likewise entitled to notice of hearing before the referee.

Rule 64; *Kingsland v. Chetwood*, 39 Hun, 602.

And the referee should ascertain that all parties have been notified, and that fact should appear in his report.

A party who has not filed his claim is entitled to be heard before the referee.

Dr. Ruyter v. Trustees St. Peter's Ch., 2 Barb. Ch. 555;
Kingsland v. Chetwood, 39 Hun, 602.

What questions can be tried.

All questions in regard to the lien of a claim can be raised before the referee the same if in an independent action.

Fliess v. Buckley, 90 N. Y. 286; *McRoberts v. Pooley*, 5
12 Civ. Pro. 139.

Surplus moneys are regarded as real estate, and any lien on the land is transferred to said money to the extent thereof of said lien.

Dunning v. Ocean Nat. Bk., 61 N. Y. 497; Mathews v. Duryee, 3 Abb. Ct. App. Dec. 220.

What the report should contain.

The report of the referee should find facts and conclusions of law. It should show what parties appeared before him; that notice of the hearing was served upon all parties entitled to be heard. It should show the whole amount of the surplus moneys, and who is entitled thereto.

Franklin v. Van Cott, 11 Paige, 129.

The testimony signed.

The testimony should all be signed by the witness and filed with the report.

Gen. Rule 30.

When exceptions should be filed.

And unless exceptions are filed to said report within eight days it stands as confirmed.

Rule 30.

But an order must be made by the court confirming the report and ordering judgment of distribution.

Hearing on exceptions.

If exceptions are filed the same may be brought to hearing at any Special Term on the usual notice to all parties.

Rule 30.

Power of the court.

The report may be confirmed, set aside or referred back, but it cannot be changed.

Mutual Life Ins. Co. v. Anthony, 23 Weekly Dig. 427.

Costs.

The costs of the proceedings are notice costs and the fees of the referee.

McDermott v. Hennesy, 9 Hun, 59.

No other allowance can be granted.

German Sav. Bank v. Sharer, 25 Hun, 409.

PRECEDENTS.

PART I.

Summons, With No Personal Claim.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

(Summons in the usual form.)

To _____, the above-named defendants :

Take notice that the summons herewith served upon you in this action is issued upon a complaint praying for the foreclosure of a mortgage executed by the defendant _____, and his wife _____, to the plaintiff herein, on the _____ day of _____, 189____, and filed in the office of the clerk of the county of Fulton, in Book of Mortgages No. _____, at page _____, on the _____ day of _____, 189____, etc., to secure the payment of the sum of five thousand dollars (\$5,000), with interest thereon from the _____ day of _____, 189____, upon the following described premises, to wit: (Description.)

That no personal claim is made against you and against any defendant except the defendant _____.

Yours, etc.,

M. D. MURRAY,

Plaintiff's Attorney.

Office and post-office address,

214 West Main street,

Johnstown, N. Y.

Lis Pendens in Mortgage Foreclosure.

(See text, page 177.)

SUPREME COURT — COUNTY OF FULTON.

(Title of the cause.)

Notice is hereby given that an action has been commenced in this court, and is now pending, upon a complaint by the above-named plaintiff against the above-named defendants, for the foreclosure of a mortgage bearing date on the day of , 189 , and executed by and his wife , to , and recorded in the office of the clerk of the county of Fulton, on the day of , 189 , at one o'clock P. M. of that day, in Book No. 70 of Mortgages, at page 73; and that the mortgaged premises affected by this foreclosure were, and at the time of the commencement of this action, and at the time of filing this notice, situate in the county of , and State of New York, and are bounded and described as follows, to wit: (Description.)

FAYETTE MOYER,

Plaintiff's Attorney.

Office and post-office address,

No. West Main Street,
Johnstown, N. Y.

To the County Clerk of Fulton County:

You are hereby directed to index the foregoing notices to the names of the defendants named, to wit, to , and to .

Yours, etc.,

FAYETTE MOYER,

Plaintiff's Attorney,

Johnstown, N. Y.

Complaint in an Action to Foreclose a Mortgage.

(See text, page 178.)

SUPREME COURT — FULTON COUNTY.

ARTHUR J. BROWN, Plaintiff,

against

JOHN A. STONE and NANCY C.
STONE, His Wife, et al., Defend-
ants.

Plaintiff complains of the above-named defendants, and states to the court the following facts:

First. That the defendant John A. Stone, for the purpose of securing the payment of the sum of one thousand dollars, with interest thereon, did, on the 1st day of May, 1896, execute to Arthur J. Brown, plaintiff herein, a bond bearing date on that day, whereby the said defendant did bind himself, his heirs, executors and administrators, in the penalty of two thousand dollars, upon condition that said bond should become null and void if the said John A. Stone, defendant, his heirs, executors or administrators or assigns should pay the said sum of money, to wit, the said sum of one thousand dollars, as follows: Three (3) years from the date thereof, with interest thereon, payable semi-annually (or, state what the conditions are); and, as security for the payment of said indebtedness and to secure the payment of the said bond, the said John A. Stone, defendant, and the said Nancy C. Stone, his wife, upon the same day did execute to the said Arthur J. Brown, plaintiff, a mortgage whereby they bargained, granted and sold unto the said Arthur J. Brown, plaintiff, the following-described premises, with the appurtenances thereunto belonging, which said premises are described as follows, to wit: (Description); that the said mortgage contained the same condition as the

said bond; and the further condition that, if the said mortgagor should fail to make payment of the said sum of money thereby secured according to the terms thereof, or of any interest, as the same became due then, the said Arthur J. Brown, plaintiff, his heirs, executors, administrators or assigns, were empowered to sell the same in due form of law; and out of the moneys arising from said sale to pay such sum of money and interest accrued thereon which were by said bond secured to be paid, together with the costs and expenses of the proceedings had thereupon, and to pay the surplus, if any there should be, to the said John A. Stone, his executors, administrators or assigns.

Second. Plaintiff further alleges that the said mortgage was duly recorded in the office of the clerk of the county of Fulton, on the 1st day of May, 1896, in Book No. 76 of Mortgages, at page 301, etc. (If the mortgage became due, upon the failure of the mortgagor to make payments within any specified time; and the said payments should remain unpaid and in arrears for a space of thirty days; that it was at the option of the mortgagee that the whole mortgage should become due and payable immediately; then state that it was therein expressly agreed, in and by said bond and mortgage, that should any default be made in the payment of either the principal or interest, or any part thereof, on the day when the same became due and payable, and should it remain unpaid or in arrears for a space of thirty days, then, and from thence forth, that is to say, that the arrearage or interest thereon should, at the option of said plaintiff, his executors, administrators or assigns, become and be due and payable immediately, although the period allotted for the payment thereof might not then have expired; and that said defendant has failed to pay the interest thereon which became due upon the 1st day of May, 1897; and that said thirty days have elapsed since the same became due, and the plaintiff has elected and does

elect, that the consideration of the whole sum so secured to be now due and payable; and that there is now due and payable upon said mortgage by reason of the said conditions therein contained, the sum of one thousand and sixty dollars.)

Third. Plaintiff further alleges that by the terms contained in said bond and mortgage the said defendants did agree to keep the premises in said mortgage described insured against loss or damage by fire, in the amount and extent of the sum of one thousand dollars, and assign the policy and certificate thereof to this plaintiff; and in default thereof that it should be lawful for this plaintiff to so effect said insurance; and the plaintiff further alleges that the said defendants have failed and refused to obtain said insurance, and so insure the said premises as in said instrument agreed; and that the plaintiff has been compelled to expend the sum of fifty dollars in premiums in effecting said insurance; that the said premiums were paid on the 2d day of July, 1896, and that the interest thereon since said time to the commencement of this action amounts to the sum of dollars, all of which amounts to the sum of dollars, and which are liens upon said mortgaged premises.

Fourth. Plaintiff further alleges that on the 1st day of September, 1896, by a deed dated on that day, the defendant, John A. Stone, and his wife, Nancy C. Stone, duly conveyed said premises described in said mortgage subject to said mortgage and the conditions contained therein, to the defendant, William White, by which said deed said defendant, William White, covenanted and agreed to pay said mortgage as part of said consideration of said deed of conveyance, which said deed was duly executed and recorded in the office of the clerk of the county of Fulton on the 1st day of September, 1896, in Book of Deeds No. 81, at page 400, etc.

Fifth. Plaintiff further alleges that the defendant, Henry Cross, herein, has or claims to have a mortgage upon said premises herein described, made and executed by William White, defendant, to him, on the 4th day of November, 1896, which said mortgage was duly recorded in the county clerk's office on the 4th day of November, 1896, in Book of Mortgages No. 78, at page 276, etc., to which said mortgage and the moneys claimed to be due and become due thereupon were, and are subsequent and inferior to the mortgage of the plaintiff's herein.

Sixth. Plaintiff further alleges that said John A. Stone, defendant, the said mortgagor; and the said defendant William White, to whom said property was sold, have failed to comply with the conditions of said bond and mortgage, by omitting to pay the sum of sixty dollars, which by the terms and conditions of said bond and mortgage the same became due and payable on the 31st day of May, 1897; and that there is now due upon said bond and mortgage the sum of one thousand and sixty dollars, with interest thereon from the day of , 189 (the date of the commencement of this action); and that there is also due to this plaintiff for premiums paid by the plaintiff upon said property, with interest thereon, which said defendants have failed to pay, the sum of dollars, together with interest thereon from the day of , 189 , to the day of , 189 (the date of the commencement of this action).

Seventh. Plaintiff further alleges that no other action has been brought to the knowledge and belief of this plaintiff, to recover any part of said mortgage debt secured to be paid.

Wherefore, plaintiff demands judgment that the defendants, and all persons claiming under them or either of them, subsequent to the commencement of this action, may be forever barred and foreclosed of all right, title,

claim, lien or equity of redemption in said mortgaged premises.

That the plaintiff have judgment for the sum of dollars, which said sum may be declared a lien upon said premises; and that said premises, or so much thereof as may be necessary to pay the amount, be sold according to law; and that out of the moneys arising from said sale the plaintiff may be paid the amount due him, together with his costs and expenses of this action so far as the moneys thereof will pay the same; and that the defendants, John A. Stone and William White, may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other and further relief as to the court may seem just and equitable.

FAYETTE MOYER,

Plaintiff's Attorney.

Office and post-office address,

Johnstown, N. Y.

(Verification.)

(NOTE.—The above form is applicable in cases of foreclosure by incorporating therein when necessary the items that may have accrued as for taxes, assessments and water rates, or where the plaintiff is the assignee of the mortgage; also, setting forth any and all liens or incumbrances that may be against the property as judgments, mechanics' liens, dower rights, etc., that may have accrued subsequent to the giving of said mortgage; or demand relief that the said taxes or water rates, etc., may be paid by the referee out of the money received from the sale of the said mortgaged premises.)

Complaint to Foreclose a Mortgage Given to Indemnify.

(See text, page 178.)

SUPREME COURT — FULTON COUNTY.

JOHN C. WALL, Plaintiff, against EDWARD J. GREEN and Another, Defendants.
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The plaintiff complains of the above-named defendants, and respectfully shows to this court:

First. That the defendant, Edward J. Green, herein, was duly elected to the office of City Chamberlain of the city of Johnstown, N. Y., on the day of , 189 ; and that, as such City Chamberlain he was, by the statutes, compelled to execute a bond in the penal sum of \$, with two or more sureties thereon, for the faithful performance of his duties as such City Chamberlain, and for the faithful paying over for all monies that came into his hands as such City Chamberlain.

Second. That the plaintiff herein, at the request and solicitation of the said defendant, Edward J. Green, became one of the sureties on said bond for the said Edward J. Green as such City Chamberlain, whereby he became and was bound in default thereof to pay any sums not to exceed the amount of said bond; and that the said defendant, for the purpose of obtaining this plaintiff's signature to said bond, and as a consideration to the said plaintiff to become said surety, and to indemnify this plaintiff against any or all loss which he might suffer or incur by reason of the said suretyship, did, together with , his wife, execute to this plaintiff a mortgage whereby they granted, sold and conveyed to this plaintiff the following described premises, to wit: (Description.)

That the said mortgage was conditioned for the payment of said money to this plaintiff providing said plaintiff became liable to, and was compelled to pay any sums by reason of his being and becoming such surety upon said bond; and in case he was so compelled to pay any sums, then this mortgage became due and payable at once; and gave this plaintiff the right, and empowered and authorized this plaintiff to sell the said mortgaged premises described therein in due form of law; and out of the moneys arising from said sale to pay the said sum of money and interest thus secured to be paid, together with the costs and expenses of the proceedings thereupon; and the surplus, if any there should be, after paying the said mortgaged debt, costs and expenses of this proceeding, should be paid to the said defendant, his heirs, executors, administrators or assigns.

Third. Plaintiff further alleges that, by reason of his being said surety upon said bond, he has been compelled to pay, and has paid the sum of dollars; and that said defendant has failed to pay to this plaintiff said sum or any part thereof; and that the sum of dollars is now due and payable upon the conditions of said mortgage.

Fourth. Plaintiff further alleges that said mortgage was duly recorded in the office of the clerk of the county of Fulton, on the day of , 189 , in Book of Mortgages No. , at page , etc.; and that no other action has been brought to the knowledge and belief of this plaintiff, for the recovery of any part of said mortgaged debt.

Wherefore, plaintiff demands judgment:

First. That he have and recover of the defendant the sum of dollars, together with the costs and expenses of this action, and that said amount be declared a lien upon said described property and premises.

Second. That said premises, or so much thereof as may be sufficient to pay the amount due to the plaintiff for said sum, interest and costs, be sold according to law; and that the defendants and all persons claiming under them subsequent to the commencement of this action be barred and foreclosed of all right, claim, lien or equity of redemption in said mortgaged premises; and that out of the moneys arising from the sale thereof the plaintiff be paid the amount due on said mortgage, with interest and the costs of this action, so far as the same is applicable thereto.

Third. That he have judgment against the defendant for any deficiency which may remain after applying the said monies.

Fourth. That he may have such other and further relief as to the court seems just and equitable.

M. D. MURRAY,
Plaintiff's Attorney.

Office and post-office address,
214 West Main Street,
Johnstown, N. Y.

(Verification.)

Defendant's Answer.

(See text, page 179.)

SUPREME COURT — FULTON COUNTY.

JOHN C. WALL, Plaintiff, against EDWARD J. GREEN, Defendant.
--

The defendant, Edward J. Green, for answer to the plaintiff's complaint herein:

First. Denies that he has any knowledge or information as to paragraphs and of plaintiff's complaint sufficient to form a belief.

Second. Defendant alleges, upon information and belief, that said plaintiff has no right, authority, title or interest in said mortgaged premises, and has no authority to bring the action herein alleged in his complaint.

Third. Defendant further alleges that said property described in plaintiff's complaint is not and never was incumbered with a lien of the mortgage as set forth in plaintiff's complaint, and he is not liable for the payment thereof, and that defendant is not indebted or liable in any way to the plaintiff for the payment of the same.

Fourth. Defendant further alleges that more than ten years have elapsed since the alleged execution of said mortgage; and that the same has been fully paid, and said premises should be released from any and all liens of the said mortgage.

Wherefore, defendant asks judgment for a dismissal of plaintiff's complaint, and that said premises be forever free and clear from any lien by reason of the said alleged mortgage as set forth in the complaint of the plaintiff, and that he have the costs and expenses of this action.

BORDEN D. SMITH,

Defendant's Attorney.

Office and post-office address,

100 West Main street,

Johnstown, N. Y.

(Verification.)

Answer of Infant, by Guardian ad Litem.

(See text, page 180.)

SUPREME COURT — FULTON COUNTY.

JOHN C. WALL, Plaintiff, against D. H. FRENCH, as Guardian ad litem of the Infant Defendant, HETTY GREEN.
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The defendant, Hetty Green, an infant, answering the complaint of the plaintiff in the above-entitled action by her guardian ad litem, D. H. French, says that she is an infant under the age of twenty-one years, and claims an interest in the premises described in the said complaint of the plaintiff; and that she submits in writing the matters in question in the case to the court, and asks the court to order and direct her in the above matters.

DONALD McMARTIN,
 Attorney for D. H. French, as Guardian
 ad litem of the Infant Defendant
 Hetty Green.

Office and post-office address,
 94 Main Street,
 Johnstown, N. Y.

(Verification.)

Affidavit for Reference.

(See text, page 181.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

STATE OF NEW YORK, } ss.:
County of Fulton, }

Fayette Moyer, being duly sworn, says that he resides in the city of Johnstown, N. Y., and that he is the plaintiff.

iff's attorney in the above-entitled action; and that this action is brought to foreclose a mortgage upon real property situate in the county of Fulton and State of New York; and that the defendants, _____, have failed to answer the complaint of the plaintiff within the time allowed by law for that purpose; deponent further says that the defendant _____, has answered said complaint by his attorney _____, which said answer is formal, and denies none of the allegations of plaintiff's complaint; and deponent further says that the defendant _____, is a non-resident of the State of New York.

FAYETTE MOYER.

Subscribed and sworn to before me this
day of _____, 189 .

EMMA J. O'CONNOR,

Notary Public,

Fulton County.

Order of Reference.

(See text, page 181.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House
in the city of Johnstown, N. Y., on the
day of _____, 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

The summons in this action having been served upon the defendants _____, personally, and on the defendants _____, by publication, pursuant to an order of this court made and entered on the _____ day of _____, 189 ; and the defendant _____, and the defendant _____, having failed to answer within the time allowed by law, and the defendant _____, and the

defendant , having answered, by which answer the rights of the plaintiff and the facts as stated in plaintiff's complaint are admitted; now, on motion of Fayette Moyer, attorney for the plaintiff, and no one appearing in opposition thereto, it is

Ordered, That it be referred to DeWitt C. Moore, Esq., a counselor-at-law of the city of Johnstown, N. Y., to ascertain and compute the amount due to the plaintiff for principal and interest; and also to examine and report whether or not the mortgaged premises can be sold in parcels without material injury to the parties herein; and it is further

Ordered, That the said referee take proof of the facts as stated in plaintiff's complaint, and as to the amount due thereon, and to also ascertain whether any payments have been made, and the amount of said payments, and report thereon with all convenient speed to this court.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Referee's Report.

(See text, pages 181, 182.)

(Title of the cause.)

In pursuance of an order of this court made in the above-entitled action on the day of , 189 , and filed with the clerk of the county of Fulton on the day of , 189 , by which it was referred to the undersigned referee to ascertain and compute the amount due to the plaintiff as set forth in the complaint of the plaintiff in this action, to examine and report whether the mortgaged premises can be sold in parcels, and take proof of the facts and circumstances as stated in the complaint, do report as follows:

First. That I took and filed the oath of office as prescribed by law.

Second. That I have computed and ascertained the amount due to the plaintiff upon and by virtue of the said bond and mortgage, and that I find and accordingly report that there is now due to the plaintiff for principal and interest thereon, at the time of this, my said report, the sum of dollars; that I have taken proof of the facts and circumstances as stated in the complaint, and find the same to be as set forth in the plaintiff's complaint; and have examined the plaintiff on oath as to any payments which have been made upon said bond and mortgage, and do report that no such payments have been made; and that I have examined the said mortgaged premises as to whether they could be sold in parcels, and accordingly report as follows: That the same cannot be sold in parcels for the fact that they consist of one piece, parcel or lot of land which cannot be subdivided without greatly impairing its value.

Schedule "A," hereto annexed, shows a statement of the amounts due for principal and interest.

All of which is respectfully submitted.

Dated at Johnstown, N. Y., this day of , 189 .

FRANK L. ANDERSON,
Referee.

SCHEDULE "A."

One bond dated the day of , 189 , in the penal sum of \$, conditioned to be paid as follows, and which said sum is secured by a mortgage of the same date:

Principal sum due. \$
Interest thereon from the day of
189 , being for years, months and
days, at six per cent per annum.

Amounting in all, and at the date of this, my report, to the sum of \$, is due to this plaintiff.

FRANK L. ANDERSON,
Referee.

(NOTE.— If there should be other mortgages or liens upon said property the referee should ascertain the amounts thereof, and accordingly report. The regular notice of hearing before the referee should be given.)

Notice of Confirmation of the Referee's Report.

(See text, page 182.)

(Title of the cause.)

Sir.—Take notice that I, the undersigned attorney for the plaintiff herein, will apply to this court at a Special Term thereof to be held in the city of Amsterdam, N. Y., on the day of , 189 , at the opening of the court on that day, or as soon as counsel can be heard, for an order confirming the said referee's report herein, a copy of which is hereto annexed and served upon you.

Dated this day of , 189 .

M. D. MURRAY,
Plaintiff's Attorney.

Office and post-office address,
214 West Main Street,
Johnstown, N. Y.

To Borden D. Smith, Esq., Defendant's Attorney, Johnstown, New York.

Final Judgment.

(See text, page 183.)

At a Special Term of the Supreme Court of the
State of New York, held at the chambers of
Hon. M. L. S., in the city of Amsterdam, N. Y.,
on the day of , 189 .

Present — Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

The summons in this action having been served upon the defendants and , by delivering to and leaving with each of them personally true copies of the same, and upon the defendant by publication, pursuant to an order of this court made and entered on the day of , 189 ; and due proof of which service has been made, and it appearing to this court on reading and filing the affidavit of , attorney for the plaintiff, that no answer has been interposed by any of the defendants herein within the time allowed by law for that purpose, denying any material allegations in the complaint; and due notices having been given of this motion by service on each of the defendants herein that have appeared in this action; and it appearing that the complaint in this action and due notice of the pendency of this action was, at the time of the commencement of this action, filed in the office of the clerk of the county of Fulton, on the day of , 189 , and the order of reference having been duly made wherein it was referred to , Esq., a counselor-at-law of the city of Johnstown, N. Y., to compute and ascertain the amount due to the plaintiff herein upon the bond and mortgage as set forth in the complaint of the plaintiff; and also to examine and report whether the mortgaged premises could be sold in parcels, without material injury

to the parties concerned; and also to take proof of the facts as stated in said complaint, as to any and all payments having been made thereon; and on reading and filing the report of the said referee named in said order, which bears date on the day of , 189 , by which it appears that there is now due on said bond and mortgage, at the date of said report, the sum of dollars; and that no payments have been made thereon, and that said property cannot be sold in parcels; now, on motion of M. D. Murray, attorney for the plaintiff, and no one appearing in opposition thereto, it is

Adjudged, That the mortgaged premises described in the complaint in this action, and hereafter more particularly described, for the purpose of satisfying said mortgage debt and expenses of this sale, and the costs and expenses of this action, together with the taxes, assessments and water rates that at the time may be a lien on the said mortgaged premises, be sold at public auction, in the county of Fulton, by and under the direction of , Esq., a counselor-at-law of the city of Johnstown, N. Y., who is hereby appointed referee for that purpose; and that said referee give public notice of the time and place of the said sale according to law, and the practice of this court; and that the plaintiff or any other party may become a purchaser or purchasers at such sale; and that said referee execute to the said purchaser or purchasers a deed or deeds of the premises so sold, and that out of the moneys arising from such sale he deduct the amount of his fees and the expenses of this sale, including all taxes, assessments and water rates, which are liens upon the property so sold; and that the referee pay to the plaintiff or his attorney the sum of dollars, adjudged to the plaintiff as his costs and expenses in this action, with interest thereon from the day of , 189 ; and also the amount so reported due as aforesaid, together with the legal interest thereon from

the date of this report, which amounts in all to the sum of dollars; and that he take a receipt therefor, and file the same with his report of sale with the clerk of the county of ; and the surplus, if any there should be, he shall pay over the same to the treasurer of the county of Fulton within five (5) days after the same is received and ascertainable, subject to the further order of the court; and that he make a report of such sale and file it with the clerk of this court with all convenient speed; and if the proceeds of such sale be insufficient to so pay the amount due to the plaintiff in interest, costs, etc., the said referee should then specify the amount of the said deficiency in his report; and the said defendant , is then required to pay to the plaintiff the residue of the debt remaining unsatisfied after the sale of the said mortgaged premises; and that the plaintiff have execution therefor; and it is further

Ordered, That the purchaser or purchasers thereto be let into the possession thereof of the said property on the production of the said referee's deed; and that the defendant and all persons claiming under them or either of them, after the filing of the said notice of the pendency of this action, be forever barred and foreclosed of all right, title, claim, interest or equity of redemption in the said mortgaged premises so sold, or any part thereof; and that they deliver up the said possession to the said purchaser or purchasers upon the production of the said referee's deed, and that the said property so ordered to be sold is described as follows: (Description.)

Enter in Fulton county.

M. L. STOVER,
J. S. C.

(NOTE.— If the property is so situated that it is sold in parcels, then the order should state what parcels should be sold, and how much thereof should be sold to so pay

the amount then due; and that upon a subsequent default of the payment of the principal or interest, the plaintiff may apply for a further order directing the sale of the residue, or so much thereof as is necessary to so pay the debt; or if the property should all be sold upon the debt not due, then the residue of the money should be invested for the benefit of the plaintiff, to be paid to him from time to time as the same should become due.)

Report of Sale.

(See text, pages 188, 189.)

(Title of the cause.)

To the Court:

(NOTE.— For proceedings in sale of property, notices, reports and orders confirming same, see Precedent in Partition, pages .)

Judgment for Deficiency.

(See text, page 191.)

(NOTE.— This is the ordinary money judgment; and for costs.)

C. H. BUTLER,
Clerk.

PART II.

STRICT FORECLOSURE.

Whenever the plaintiff desires to obtain a judgment against the defendant for the payment of the mortgage debt, interest and costs within a certain time fixed by the court or in default thereof, and that defendant and all persons claiming under him shall be barred and foreclosed of their claim and equity of redemption in the mortgaged premises, and that the title be vested in plaintiff without any sale, this proceeding is resorted to.

In what cases.

It is only proper, and can be resorted to only in case of a mortgage for the purchase price, when the value of the premises do not exceed the debt; also where mortgagee is in possession under title from the mortgagor for the purpose of cutting off subsequent liens or incumbrances, as in the case of a purchase in good faith at a mortgage sale which is not conclusive against some incumbrancer who has not been made a party to the suit.

Jones on Mortgages, § 1540.

Also, where a mortgage is in the form of an absolute deed without any written defeasance.

Howe v. Fisher, 2 Barb. Ch. 559.

Also upon a land contract for failure to make payments.

Jones on Mortgages, § 1541.

Also where the property is situate in another State, and the parties are within the jurisdiction of the court of this State, and subject to its authority.

House v. Lockwood, 40 Hun, 532.

In every case where the mortgagee has no personal demand against the mortgagor, and the property, if not redeemed, is by agreement of the parties to be taken upon the debt.

Lansing v. Goelet, 9 Cow. 346-356; House v. Lockwood, 40 Hun, 532.

And the whole debt must be due.

Jones on Mortgages, § 1557.

The proceedings in this remedy are the same as in the ordinary actions.

The parties should be the same except where the action is to cut off the rights of some parties who were omitted in an action of foreclosure; then such persons should be made the parties, and are the only necessary parties defendant.

Jones on Mortgages, § 1558.

If to perfect the title of foreclosure that is void, then all parties having a lien or claim should be made parties.

The pleadings are practically the same. The plaintiff can, in his complaint, offer to take the mortgaged premises in full payment of his debt.

Jones on Mortgages, § 1560.

See form of complaint in

Kendall v. Treadwell, 5 Abb. Pr. 16, or, same case, 14 How. 165.

(See forms, page 217.)

Judgment.

Judgment can only be entered upon application to the court, and must be to the effect that the defendants and all persons be forever barred and foreclosed of all equity and claim unless they redeem and pay the mortgage before a day certain fixed in the judgment.

Jones on Mortgages, § 1561.

It is an interlocutory judgment, and the time to redeem is usually six months from the entry, but the time is discretionary with the court, and after the entry of the judgment the time will not be enlarged.

McKinstry v. Emerson, 3 Johns. Ch. 466n; Perrine v. Dunn, 4 Johns. Ch. 140.

Amount to be paid.

The amount to be paid and where, should be named in the judgment.

As to strict foreclosure in general,

See Ross v. Boardman, 22 Hun, 527.

PRECEDENTS.

PART II.

Complaint in an Action in Strict Foreclosure.

(See text, page 216.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

The plaintiff complains of the above-named defendants, and respectfully shows to this court:

First. That heretofore and on the day of , 189 , the plaintiff herein, being the owner of and in the possession of the property hereinafter described, did execute a deed of conveyance to the defendant for said premises, whereby for and in consideration of the sum of dollars he did grant and convey to said defendant all his right, title and interest therein.

Second. Plaintiff further alleges that for the purpose of securing the payment of the sum of dollars, being part of the consideration for said premises remaining unpaid, said defendant did, on the same date, execute and deliver to the said plaintiff herein his bond, bearing date on that day, sealed with his seal, whereby said defendant did bind himself, his heirs, executors and administrators in the penal sum of dollars, upon the condition that if the same should be paid then the same would become null and void; otherwise, the said defendant, his heirs, executors, administrators or assigns should pay the said sum of money as follows, to wit: On or before five (5) years from the date of the said execution of said bond and mortgage, with interest thereon, and as collateral security for the payment of said indebtedness the said , defendant, and ,

defendant, his wife, on the same day executed to the said plaintiff , herein, a mortgage, whereby they granted, bargained and sold to the said , plaintiff, the said premises, which said premises are situated in the county of Fulton and State of New York, and bounded and described as follows, to wit: (Description); together with the appurtenances and hereditaments thereunto belonging, or in any wise appertaining; that the said mortgage contained the same conditions as the said bond, and the further condition, that if the said defendant should pay the said monies or any part thereof promptly when due, then the said bond should become null and void; otherwise the said plaintiff was empowered and authorized to sell the said mortgaged premises in due form of law, and out of the moneys arising from said sale to pay the said sum of money in and by said bond secured to be paid, together with the costs and expenses thereof; which said mortgage was duly recorded in the office of the clerk of the county of Fulton on the day of , 189 .

Third. Plaintiff further alleges that the said defendants have failed to comply with the said conditions of the said bond and mortgage by omitting to pay the sum of dollars, which sum became due thereon on the day of , 189 ; and that there is now justly due and owing to the plaintiff upon said bond and mortgage the sum of dollars, with interest thereon from the day of , 189 ; that the value of the said premises is not and does not exceed the amount due to the plaintiff upon said bond and mortgage.

Fourth. Plaintiff further alleges that the said mortgaged debt became due as aforesaid, with interest, on the day of , 189 ; and that the receipts of the said rents and profits thereof, as received by this plaintiff, are not sufficient in amount to equal the annual interest upon said bond and mortgage.

Fifth. Plaintiff further alleges that he has been compelled to, and has laid out considerable sums of money in expenditures for permanent improvements on said premises, in improving the land, buildings, fences, etc., which he claims by way of off-set against so much of the rents and profits which he has received; and that he has also paid the sum of dollars for taxes, assessments and water rates, which he also pleads as an offset, and which should be allowed him against such rents and profits, which several sums after being so credited to the plaintiff, will leave remaining due him over and above the said rents and profits so received by him upon the said bond and mortgage, the sum of dollars.

Sixth. Plaintiff further alleges that the defendant , has an interest in said mortgaged premises in and by virtue of a mortgage thereon executed by the said defendant , subsequent to the mortgage of this plaintiff.

Seventh. Plaintiff further alleges that he has demanded of the defendant the sum due him upon said bond and mortgage, or to come to an accounting for the rents and profits and improvements charged by said plaintiff; and after the proper charges and credits to pay to the said plaintiff what should appear to be due on said mortgage; or, in default thereof, to release his right and equity of redemption of said mortgaged premises; and that the defendant has refused and still refuses to so do, or to comply with the plaintiff's demand.

Wherefore, the plaintiff demands judgment against the defendant that an accounting may be taken of what is now due and owing unto this plaintiff for principal and interest on the said bond and mortgage; and that an accounting may also be taken of the rents and profits of the said mortgaged premises which have been received by the said plaintiff; and also of the expenditures of the said plaintiff for permanent improvements, and for taxes,

assessments, etc.; and that the defendant may be adjudged to pay to the plaintiff what may be found due to him on the taking of the said accounting, together with the costs and expenses of this action, within a time appointed by this court, or in default thereof, that the said defendant and all persons claiming under them may be absolutely barred and foreclosed of every right, title or equity of redemption in and to the said mortgaged premises, and every part thereof; and that the said defendants may be adjudged to deliver up to the plaintiff all the papers and writings of every kind and description that may concern the said mortgaged premises; or that they may be ordered to reconvey to the said plaintiff any title or interest that they may have in and to the said premises; and for such other and further relief in the premises as may to the court seem just and equitable.

M. D. MURRAY,

Plaintiff's Attorney.

Office and post-office address,

214 West Main Street,

Johnstown, N. Y.

(Verification.)

Judgment in Strict Foreclosure.

(See text, page 216.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House in
the city of Johnstown, N. Y., on the day
of , 189 .

Present.— Hon. M. L. S., Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

The summons in this action having been served on the defendants herein, and upon the affidavit of M. D. Murray,

attorney for the plaintiff, showing to the court that no answer has been interposed by any of the defendants herein within the time allowed for that purpose denying any material facts of the plaintiff's complaint, and it also appearing to the court that by an order of this court duly made and entered on the day of , 189 , by which it was referred to Dewitt C. Moore, Esq., to ascertain what, if anything, was due and owing to the plaintiff for principal and interest on the bond and mortgage described in the complaint of the plaintiff; and, also, to ascertain as to the rents and profits of the said mortgaged premises which have been received by said plaintiff; and, also, the expenditures made by the said plaintiff for permanent improvements; and, also, to ascertain what sums have been paid for taxes, assessments and other expenses, claims and liens of every extent, if any, against the said property described in the complaint; and the said referee, having duly made and filed with the clerk of the county of Fulton on the day of , 189 , his report, by which it was found that there is now due and owing to this plaintiff upon said bond and mortgage the sum of dollars; and that there is now due and owing to this plaintiff for moneys paid by him in permanent improvements, taxes, assessments, etc., and upon the rents and profits which he has received therefrom the sum of dollars; that the and defendants herein, hold liens against said property by virtue of a mortgage, which said liens or incumbrances were, and now are, subsequent and inferior to that of the plaintiff herein, and it appearing to the court that due notices of this application for judgment has been given to all of the defendants herein, now, on motion of M. D. Murray, attorney for the plaintiff, and no one appearing in opposition thereto, it is

Adjudged, That if the defendant, or either of them, shall not within sixty (60) days after the entry of the

judgment in this action give notice in writing to the attorney for the plaintiff herein of their election to pay the amount which may be due to the plaintiff for principal, interest and costs of this action, and for all necessary expenses in relation thereto, then, that the said defendants, or either of them, and all persons claiming to, or claiming under them or either of them, after the filing of the notice of the pendency of this action be and they are forever absolutely debarred and foreclosed of and to all right, interest and equity of redemption in and to the said mortgaged premises hereinafter described; and that the said plaintiff shall hold said premises in full satisfaction for the amount due and secured by said bond and mortgage as set forth in the said complaint; and, it is further

Adjudged, That in case said notice shall, before the time specified has expired, be given to the plaintiff herein by the defendants, or either of them, that they elect to pay the amount so found, together with the costs and expenses of this action, including the additional allowance and the costs and expenses of the referee and accounting therein had, or pay or tender the same to the said plaintiff, then said plaintiff is hereby ordered to reconvey said mortgage premises to the said defendant or defendants by a suitable and proper instrument of conveyance, which said instrument is to be approved by this court in case the parties cannot agree upon the form thereof, free and clear from all incumbrances suffered by him or any person claiming under him; and, in default of said taxes paid unto said plaintiff and for the said principal, interest and costs, as aforesaid at the time limited by and for that purpose, it is further

Adjudged, That the said defendants and all persons claiming under them be forever absolutely debarred and foreclosed of every right, title or equity of redemption in

said mortgaged premises, which said mortgaged premises are described as follows, to wit: (Description.)

Enter in Fulton county.

M. L. STOVER,
J. S. C.

(NOTE.— Notice for the appointment of a referee, the hearing had before the referee, notice of order confirming referee's report, is the same as in cases of like practice.)

For the form see ante, pages 206 to 210.

PART III.

FORECLOSURE BY ADVERTISEMENT.

Foreclosure by advertisement or sale under a power.

When there is inserted in the mortgage a clause giving the mortgagee the right and power to sell the land upon the failure of the mortgagor to comply with the conditions therein named, the mortgagee can proceed to sell the property upon which he has a claim by virtue of his mortgage without first obtaining a judgment.

Code, § 2387.

Proceedings statutory.

The proceedings thereunder being statutory the statute must be strictly followed and complied with or the sale will be void, as the court has no power to amend or remedy defects.

Van Vleck v. Enos, 88 Hun, 348.

When foreclosed.

A mortgage can be foreclosed by advertisement when:

First. The mortgage is upon real property situate within the State.

Second. When there is a power contained in the mortgage to the mortgagee or any other person to sell the mortgaged property conditional on default.

Third. When the default has been made.

Fourth. When an action has not been brought to recover the debt secured by the mortgage or any part thereof, or if brought it has been discontinued or final judgment has been rendered therein against the plaintiff and execution in favor of plaintiff has been issued and returned wholly or partly unsatisfied.

And the mortgage has been properly recorded and in all the counties where the property is situate.

Code, § 2887; Wells v. Wells, 47 Barb. 416.

Notice.

A notice subscribed by the person entitled to execute the sale or his attorney, if his name appears in the notice must be given by the person entitled to execute the power of sale that the mortgage will be foreclosed by a sale of the mortgaged property or part of it at a certain time and place.

How given.

Said notice is given as follows, viz.:

A copy must be published at least once a week for twelve weeks (or 84 days) preceding the sale, and in each county where the property is situate.

A copy must be posted on the Court House door or near the entrance of the Court House door nearest the property to be sold, eighty-four days preceding the sale, or, in the city and county of New York, at or near the entrance of the Court of Common Pleas.

A copy must be delivered at least eighty-four days before the sale to the County Clerk of the county where the property is situate.

A copy must be served upon the mortgagor, his wife, or if he is dead, upon his widow, executor or administrator.

Upon a subsequent grantee whose conveyance is of record, his wife, or if he is dead, upon his widow, executor or administrator.

Upon any person then having a lien upon the property subsequent to the mortgage, by delivering a true copy thereof to such person or by leaving a true copy thereof at his dwelling house with a person of suitable age.

When made.

Said service must be made at least fourteen days before the sale. If any of said persons above-named are non-residents of the State at the time, or if the mortgagor is a foreign corporation, then service can be made in like manner, but it must be twenty-eight days before sale.

If the service is upon any person having a subsequent

claim, the service can be personal fourteen days before sale, or by depositing a copy in a securely postpaid wrapper in the post-office at least twenty-eight days before the sale.

Who is to be notified.

Notice must be given an assignee in bankruptcy.

Ostrander v. Hart, 130 N. Y. 406.

Only to all persons whose conveyances are of record.

Decker v. Boice, 83 N. Y. 215; Raynor v. Raynor, 21 Hun, 36; id., 94 N. Y. 248.

A judgment creditor who files his judgment between the first publication and sale.

Groof v. Morehouse, 51 N. Y. 503.

The owner of the equity of redemption and junior mortgagee.

Dickerson v. Seelye, 12 Barb. 100.

As to service on executors and administrators.

Stanley v. Freckalton, 65 Hun, 138; Pitt v. Amend, 84 Hun, 492.

Publication.

The publication must be eighty-four days, exclusive of the day of publishing.

Howard v. Hatch, 29 Barb. 297.

Duty of county clerk.

The County Clerk must affix said notice in a book kept by him for that purpose, and index it to the mortgagor.

Code, § 2390.

Contents of the notice.

The notice must contain the following:

The name of the mortgagor, the name of the mortgagee and the names of each assignee of the mortgage.

The date of the mortgage and the time when, and the place where, it was recorded.

The amount due at the time of the first publication, and if the mortgage is not all due, the amount to become due thereon.

The description of the premises, being the same description as contained in the mortgage.

Code, § 2391.

What the affidavit must show.

The affidavit of service by mail must show positively that the place of address was the residence of the party to whom it was sent.

Mowry v. Sanborn, 65 N. Y. 581.

What the notice is to state on subsequent lien.

Notice must state the amount of prior incumbrances where the property is sold on a subsequent lien and subject to said incumbrances, and is void if they are incorrectly stated.

Ritter v. Devine, 80 Hun, 303.

Sale.

The sale must be at public auction in the daytime, on a day other than Sunday or a public holiday, in the county where the property or some part is situate, except where the mortgage is to the People of the State, then the property may be sold at the Capitol. If the sale is not made on the day advertised it can be postponed from time to time to some future date, by publishing a notice of postponement in the same paper once a week till the date of sale.

Code, §§ 2392 and 2393.

How the property sold.

The property must be sold together, unless it consists of separate parcels, and then must be sold in parcels, and only so many as will satisfy the claim and costs and expenses, except where two or more buildings are situate upon the same lot, then they must be sold together.

Code, § 2392.

Who can purchase.

The mortgagee or his assignee or his legal representative can purchase at the sale.

Code, § 2394.

But the auctioneer cannot bid the property in for them.

Campbell v. Swan, 48 Barb. 109.

Force and effect of sale.

A sale under this title is equivalent to a sale under a judgment of foreclosure, and bars all claim or equity of redemption in the property sold, as to the following persons:

First. The mortgagor, his heirs, devisees, executors or administrators.

Second. Every person claiming under them by title or lien subsequent to the mortgage, who were properly served.

Third. Every person whose assignment, mortgage or other conveyance or claim, was not duly recorded at the time the notice of sale was handed to the clerk of the county.

Fourth. Every other person claiming under a statutory lien or incumbrance created subsequent to the mortgage attaching to the title or interest of any of the persons named in the two foregoing paragraphs.

Fifth. The wife or widow of the mortgagor or subsequent grantee who were properly served with notice where the lien of the mortgage was superior to their contingent or vested rights.

Code, § 2395.

After the sale is complete.

When the sale is complete there must be filed in the County Clerk's office of the county where the sale took place, proof of the necessary steps that have been taken, which proof is by affidavits of the auctioneer, or the party who sold the property, of the publisher, printer, foreman or principal clerk, of the party who affixed the notice or saw it done, of the County Clerk or of the person who affixed the notice in the book or saw it done, and affidavits of the service upon the necessary parties.

Code, § 2399.

What the affidavit of the person who sells must contain.

The affidavit of the party who sold must contain the time when, and the place where, the sale was had; how

much each parcel was sold for, and the name of the purchaser of each.

Affidavit of publisher.

The affidavit of the publisher must state the manner and for how long, commencing when and ending when, the notice and each postponement was published.

Affidavit of posting.

The affidavit of the party posting the notice must state where and when he posted the notice, or saw it posted.

Affidavit of county clerk.

The affidavit of the County Clerk or other person who affixed or saw the notice affixed, must state when it was so done, in what book, and that it was properly indexed.

Affidavit of service.

And the affidavit of the service of the notice must state on whom it was served, where it was served, how it was served, if personally or by leaving it at the house of the party, and if so, with whom, and if it was a person of suitable age (stating the age as near as possible) and discretion, and if by mail, the manner of the wrapper securely closed, postpaid and to what office and the specific address, and what was the then known address of the party.

Code, § 2396.

Separate affidavits.

If the land is sold in separate parcels, separate affidavits may be made for each parcel, or one affidavit for all.

Code, § 2396.

Notice attached.

The above affidavits may be all in one if the same party makes them all, but to each affidavit must be attached a copy of notice, or one copy can be attached to all the affidavits put together, if each affidavit clearly and specifically refers to the same, and they are filed and recorded together, and properly indexed.

Code, §§ 2397 and 2398.

Filing and recording.

Said affidavits must be filed and recorded at length in the office of the clerk of the county where the sale was held, and where the property is situate, in two or more counties, certified copies of the same must be filed and recorded in each of said counties, and properly indexed.

Code, §§ 2398 and 2399.

Strict compliance.

Strict compliance with the foregoing sections in regard to the proof of proceedings must be had, as the title of the purchaser rests upon them as a matter of record.

Cowdray v. Turner, 85 Hun, 451.

Time to be filed.

Notice and proof must be filed in a reasonable time.

Tuthill v. Tracy, 31 N. Y. 157.

Costs.

The mortgagee is entitled to the following costs and disbursements to be taxed upon notice by the clerk:

For drawing the notice of sale, the notice of postponement, and for the affidavits as herein stated, twenty-five cents for each folio, and for copies of the above thirteen cents for each folio.

For serving each of the notices served, one dollar.

For posting the notice, one dollar.

For superintending the sale and attending to the execution of all necessary papers, two dollars.

For fees paid for publishing the notice and for postponement not to exceed twenty-four weeks.

For fees paid the clerk for affixing and indexing the notice.

For fees paid the clerk for recording the affidavits and for making and recording necessary certified copies thereof.

For sums paid for necessary postage and searches.

Code, §§ 2401, 2402, 2403.

Moneys to be paid into court.

All moneys received by anyone arising upon a sale must, within ten days after it is received, be paid into the

Supreme Court, less the sum due or to become due upon the mortgage, and the costs and expenses of the foreclosure.

Code, § 2404.

Surplus.

Any person who, at the time of the sale, had any interest or lien upon the property sold or any part thereof, may at any time before an order of reference is made, file in the office of the clerk of the county a petition stating the nature and extent of his claim, and asking for an order directing the payment to him of the surplus, or a part thereof.

Code, § 2405.

Notice for reference.

After the expiration of twenty days from the date of sale, any person having filed a petition may apply to the Supreme Court at a term held within the judicial district where the petition is filed, for an order pursuant to the prayer of the petition, upon an eight days' notice to each person who has filed a like petition, and upon each person who was served with a notice of the sale as is shown by the affidavit of sale, or his executor or administrator, by leaving a copy with each of such persons at his residence, or by depositing in the post office.

Unless it is shown by affidavit to the court that such service cannot with due diligence be made, then the court will direct how service will be made.

Code, § 2406.

Order for reference.

The court must, upon the presentation of the petition, make an order referring the same to a referee to ascertain and report the amount due to each and every person, and the priorities thereof. Upon the confirmation thereof an order is made by the court for the distribution as it appears just.

Code, § 2407.

Sale of decedent's property; moneys paid into surrogate's court.

These proceedings for obtaining surplus moneys do not apply to the sale of decedent's property, where letters of testamentary or of administration were issued within four years before the sale, in which said case it must be paid into the Surrogate's Court, there to be distributed.

Code, §§ 2408 and 2798.

The foregoing proceedings do not apply to the foreclosure of mortgage wherein they are inconsistent to any provisions of the statute for foreclosure of mortgages to the People of the State or to Loan Commissioners.

Code, § 2409.

For proceedings for foreclosure of mortgage given to the people, see

Birdseye Statute (2d ed.), vol. 2, page 2092, §§ 13 to 38, inclusive.

Lands used and occupied for cemetery purposes cannot be mortgaged.

Laws of 1879, ch. 310, § 1.

PRECEDENTS.

PART III.

Notice of Sale.

(See text, page 225.)

Whereas, default has been made in the payment of the moneys secured by a mortgage dated the day of , 189 , and executed by Henry Wells, of the city of Johnstown, county of Fulton and State of New York, which said mortgage was recorded in the office of the clerk of the county of Fulton on the 3d day of December, 1897, in Book of Mortgages No. 78, at page 342, etc. (If the mortgage has been assigned, then state that said mortgage, together with the bond, for which the said mortgage was given to secure, has been duly assigned to the undersigned, and the same is now owned by him); and, whereas, default has been made in the payment of the amount due herein, and secured to be paid by said mortgage as aforesaid, and that there is now due and owing to said mortgagee (or assignee, or holder of the mortgage at the time), by virtue of said mortgage at the date of the first publication of this notice the sum of \$1,060, to wit: The sum of \$1,000 principal and the sum of \$60 interest; and no suit, proceeding or action at law has been instituted to recover the said mortgage debt, or any part thereof (where an action has been begun to recover the amount of the debt and execution has been issued in favor of the plaintiff and is returned wholly or partly unsatisfied, then state that said action has been begun and that said execution has been issued and returned wholly or partly unsatisfied); and, whereas, in said mortgage it was therein expressly agreed that the interest should become due and payable

upon said principal semi-annually in each year until the same was fully paid and satisfied, and that in default thereof in the payment of the said principal and interest, on any date when the same was payable as was therein expressed in said mortgage and should it remain unpaid and in arrears for a space of 30 days, then, and from thenceforth, that is to say, after the lapse of the said thirty days, the principal sum of \$1,000, the amount of said mortgage, or the amount of the arrearage of said interest, should at the option of the said mortgagee, his executors, administrators or assigns, become due immediately thereafter; and, whereas, the said Henry Wells has failed to pay the interest which became due on the day of _____, 189____, or any part thereof, and the same is now remaining unpaid and in arrears for the space of thirty days, the undersigned mortgagee has elected and does elect that the whole sum should become due and payable immediately (if the clause just stated should not be in the mortgage, and the mortgage should be foreclosed, then state simply that it was due at the time, then said facts should be stated); now, therefore, notice is hereby given, that by virtue of the said mortgage, and the power of sale therein contained, and in pursuance of the statutes, the said mortgage will be foreclosed by a sale of the said mortgaged premises in said mortgage herein-after described by the undersigned _____, mortgagee, named in said mortgage, in front of the Court House in the city of Johnstown, county of Fulton and State of New York, on the _____ day of _____, 189____, at ten o'clock in the forenoon of that day. (The sale must be at least twelve weeks from the first publication of the notice.)

The following is a description of the mortgaged premises as contained in said mortgage: (Description.)

.....

Mortgagee.

Affidavit of Service.

(See text, page 227.)

STATE OF NEW YORK, }
County of Fulton, } ss. :

Philip Keck, being duly sworn, says that he resides in the city of Johnstown, county of Fulton and State of New York, and is the attorney for the mortgagee whose name is hereunto subscribed to the copies of foreclosure and sale hereto annexed, and that at the times and places hereinafter mentioned he served personally a copy of the said notice on the following-named persons respectively: On the day of , 189 , at , by delivering to and leaving with a copy of said notice, and , by delivering to, and leaving with a copy of the said notice. Deponent further says that he personally served a copy of the said notice upon the following-named persons, to wit: On and , by inclosing the same in a securely sealed and postpaid envelope, directed to each of them at their last known place of residence, which was at No. street in the city of , county of and State of , which said notices were mailed on the day of , 189 , and were deposited in the post-office of the city of Johnstown, county of Fulton and State of New York, where deponent then resided, by paying the full regular postage on each of them; and deponent further says that there is a regular communication by mail between the said post-offices at the city of Johnstown and the city of , to which said notices were so directed.

.....(Sig.)

Jurat.

(NOTE.—Annex printed copy of the notice.)

(See text, page 229.)

Philip Keck, being duly sworn, says that he is the attorney for the mortgagee named in the notices of sale hereto annexed, and that he personally, on the _____ day of _____, 189____, at least eighty-four days before the day of said sale specified in said notice, posted a notice thereof by fastening up a copy of the said printed notice in a conspicuous place at the entrance to the Court House in the city of Johnstown, N. Y., that being the building wherein the County Court of said county is held, and that being the place of sale, as stated and directed by the said notices.

(Jurat.) Sig.

(See text, page 229.)

Philip Keck, being duly sworn, says that he is the attorney for the mortgagee named in the annexed printed notice of sale, and that on the day of , 189 , which was at least eighty-four days before the date of sale, he delivered to the clerk of the county of Fulton, wherein said mortgaged property is to be sold, as stated in the copy hereto annexed, a copy of the said printed notice.

(Jurat.) Sig.

**Affidavit of Affixing a Copy of the Notice in the Book Kept by the
County Clerk.**

(See text, page 229.)

STATE OF NEW YORK, } ss.:
County of Fulton, }

Charles H. Butler, being duly sworn, says that he is the clerk of the county of Fulton, which is the county wherein the said mortgaged property described in the annexed printed notice of sale is situated; and that on the day of , 189 , or as soon as he received the said printed notice of sale, he did personally affix the copy of the said annexed notice of sale in a book kept in his office for that purpose; and that he did make and subscribe a memorandum of the time when the same was received; and did also index the same to the name of the mortgagor; and that the time which the same was so received was at least eighty-four days before the date of sale, as specified in said printed notice.

CHARLES H. BUTLER,
County Clerk,
Fulton County.

Subscribed and sworn to before me this
day of , 189 .

EMMA J. O'CONNOR,
Notary Public,
Fulton County.

Affidavit of Publication.

(See text, page 229.)

STATE OF NEW YORK, } ss.:
County of Fulton, }

George F. Beakley, being duly sworn, says that he resides in the city of Johnstown, county of Fulton and

State of New York, and that he is the publisher of the Johnstown Daily Democrat, a newspaper published in the city, county and State aforesaid, that being the county wherein the property described in the annexed printed notice of sale is situated; and that the annexed notice of the mortgage sale was published in said newspaper at least once in each of the twelve weeks preceding the day of sale as in said notices specified. The first publication of said notice of sale commencing on the day of , 189 , and ended on the day of , 189 .

GEORGE F. BEAKLEY.

Subscribed and sworn to before me this
day of , 189 .

EMMA J. O'CONNOR,

Notary Public,

Fulton County.

(NOTE.— If the said sale was postponed, then state that the notice of the said postponement of the said sale hereto annexed, was also published in said newspaper on the day of , 189 , and the day of , 189 , with the original notice of the form shown in the said annexed printed copy thereof.)

Affidavit of Auctioneer.

(See text, page 228.)

STATE OF NEW YORK, {
County of *Fulton*, } ss.:

John Doe, of the city of Johnstown, county and State aforesaid, being duly sworn, says that he officiated as auctioneer at a sale of the premises described in the annexed printed copy of the notice of sale, and that pursuant to said notice he did, on the day of ,

189 , at ten o'clock A. M. of that day, in front of the Court House in the city of Johnstown, county of Fulton and State of New York, sell said premises as in the notice set forth; said sale was made in one parcel, and sold to Andrew J. Nellis, of the city of Johnstown, county and State aforesaid, for the sum of \$1,060, he being the highest bidder therefor, and that being the highest sum bidden for the same; and that the said property so sold consisted of a farm; and that the sale was in all respects fairly and legally conducted.

JOHN DOE.

Subscribed and sworn to before me this
day of , 189 .

EMMA J. O'CONNOR,

Notary Public,

Fulton County, N. Y.

(NOTE.— The notice of sale, and of each and every postponement thereof, must be annexed to this affidavit.)

(NOTE.— When the sale has been completed there must be filed with the County Clerk of the county wherein the property is situated and where the sale took place, affidavits stating the time when, and the place where the sale took place, with the name of the person purchasing, and the distinct or separate parcel sold or purchased, and which affidavit must be made by the auctioneer officiating at the sale; there must also be an affidavit of the publisher, or the foreman of the publishing house, stating that the notices have been published in the paper for the time stated and required to be so published by law; the affidavit of the attorney, or his principal clerk, as to the posting of the notices at, or near the entrance of the Court House door; and the affidavit of the County Clerk, as to the receiving and affixing the said notice in the book kept in his office for that purpose; and the affidavit of service upon the necessary parties; and a printed copy of the

notice should be attached to each one of the several affidavits, or if on one, state it in reference to each affidavit; and the affidavits must be filed with the clerk of the county at length; and if the property is situated in more than one county certified copies of the same must be filed in each county.)

See text, page 229.

CHAPTER V.

CLAIM TO REAL PROPERTY.

To determine a claim to real property.

Any person who has been, or he and those whose estate he has, in possession of real property or any undivided interest therein for one year, in fee, for life or for a term of years more than ten, may maintain an action to compel the determination of any claim adverse to his which is in possession, reversion or remainder, or any interest, or lien, or incumbrance of the value of at least \$250, except a claim for dower.

Code, § 1638.

These proceedings are regulated by the Code of Civil Procedure, sections 1638 to 1650, as amended by the Laws of 1891, chapter 210. The proceedings are similar to those in ejectment, sections 1642 and 1646.

The defendant may deny possession, in which case if he succeeds he gets his costs (section 1640), or he may allege title and demand appropriate relief (section 1641, as amended by Laws of 1891, chapter 210).

Possession of tenant is possession of landlord.

King v. Townsend, 78 Hun, 380.

For lost deed.

An action in equity may be maintained against a grantor, or in case of his death, against those representing his title, to compel the giving of a deed where an unrecorded deed is lost.

Kent v. Church of St. Michael, 136 N. Y. 10.

What plaintiff must show.

Plaintiff must show possession under some claim of title.

Bohn v. Hatch, 133 N. Y. 64.

Void deed.

Action to try title under void deed comes within section 1638.

Place v. Riley, 98 N. Y. 1.

Injunction.

An injunction pendente lite will be issued restraining defendant from maintaining any action affecting the same lands until the final determination of the plaintiff's action.

Cuthbert v. Chauvert, 37 N. Y. St. R. 941.

Also to restrain defendant's interference.

Stamm v. Bostwick, 30 Hun, 70.

Actual possession.

An actual entry, a possession in fact, as distinguished from a possession in law or constructive possession, is required.

Churchill v. Onderdonk, 59 N. Y. 135; Cleveland v. Crawford, 7 Hun, 616.

Actual possession under claim of title is sufficient.

Schroeder v. Gurney, 10 Hun, 413.

Action against a corporation.

The action may be maintained by or against a corporation, or by or against an incorporated association, or against the receiver or other successor of any such corporation or association.

Code, § 1650.

Complaint.

The complaint must show:

First. The plaintiff's right to the property.

Second. Whether his estate is in fee, for life or for a term of years not less than ten, and how he holds, as heir, devisee or purchaser, and his source of title.

Third. That the property has been in his possession or of those from whom he derives title, either as sole tenant or as joint tenant or as tenant in common, for at least one year before the commencement of the action.

Fourth. That the defendant unjustly claims an estate or interest therein, or easement therein, or a lien or incumbrance thereupon of the amount or value of at least \$250.

Fifth. And must describe the property with common certainty, setting forth the name of the township or tract,

and the number of the lot, if any, or in a manner so that the possession of the property claimed may be delivered.

Code, §§ 1511 and 1639.

Allegation as to defendant's claim.

That the defendant unjustly claims title to the premises in question, and demand judgment against the defendant that his claim be forever barred.

Bailey v. Briggs, 56 N. Y. 407.

As to ownership.

It is sufficient for plaintiff to allege that he is the owner in fee and has been in possession; it is not necessary to state that he is the sole owner, and that defendant unjustly claims an ownership, estate or interest therein, adverse to that of plaintiff, is sufficient.

King v. Townsend, 78 Hun, 380.

As to defendant's claim.

Plaintiff should allege that defendant has made a claim adverse to that of plaintiff before the commencement of the action, and the facts of his claim must be stated, i. e., what estate the defendant claims to have, and how.

Brown v. Teel, 59 Hun, 91.

Sufficient statement.

That the defendant unjustly claims an estate in the premises in fee, for life or for a term of years not less than ten, or in reversion or remainder, by virtue of a lease or conveyance made by a party named, which the defendant claims to own, are sufficient.

Philip v. R., W. & O. R. R. Co., 30 St. R. 41.

Facts necessary.

All facts necessary to bring the case within the statute must be alleged.

Austin v. Goodrich, 49 N. Y. 266; Bailey v. Briggs, 56 N. Y. 407.

Demand for judgment.

The demand for judgment must be to the effect that the defendant and every person claiming under him be barred from all claim to the said property, or claim to any inter-

est therein, or lien or incumbrance thereupon, or for any appropriate relief.

Code, § 1639.

Answer.

The defendant in his answer may put in issue the fact of plaintiff having been in possession for one year next preceding the commencement of the action, or of those from whom he derives title.

Code, § 1640.

If the defendant does so, and succeeds upon that defense, he is entitled to judgment dismissing plaintiff's complaint and costs.

Code, § 1640.

Or the defendant may, in addition to the above defense, plead title or possession in himself, by showing that he has an estate in said premises or some part thereof adverse to plaintiff in fee, for life, for a term of years not less than ten, in possession, remainder or reversion, or that he has an interest or an easement in, or a lien or incumbrance upon, said property (of the value of \$250).

Code, § 1641.

And he may demand that the complaint be dismissed, and that he may have judgment that the plaintiff and all claiming under him be forever barred from all claim, or that he enforce his interest or easement, or his lien or incumbrance thereupon.

And he may combine any two or more of said demands.

Code, § 1641.

Defendant may also set up any defense that would tend to defeat the plaintiff's right to relief.

Ford v. Belmont, 69 N. Y. 567.

What defendant must prove.

For defendant to have judgment in his favor he must set up and prove his own title; want of title in the plaintiff is not sufficient.

Benson v. Townsend, 26 St. R. 644.

A plaintiff that only shows possession under an unfounded claim, and defendant shows actual possession prior to entry of plaintiff, it is a sufficient defense.

Ford v. Belmont, 69 N. Y. 567.

Evidence.

Proof that the premises were assessed to plaintiff is admissible.

Hager v. Hager, 38 Barb. 92.

Burden.

The burden is on defendant to produce and prove his title; plaintiff need only show his possession as required by the statute.

Barnard v. Simms, 42 Barb. 304.

Amendments.

Pleadings may be amended as in other actions.

Brown v. Leigh, 49 N. Y. 78.

Power of court.

The court has power to open a judgment on failure to answer.

Mann v. Provost, 3 Abb. 446.

Proceedings.

When the issue of fact is joined and the defendant claims an estate in said property, the proceedings then are the same as an action in ejectment, except a final judgment is conclusive against the other party as to the title established, and against every person claiming from, through or under him, or under that party, by title accruing after the filing of the judgment roll, or the filing of notice of the pendency of the action.

Code, §§ 1642 and 1646.

See proceedings in ejectment, pages 13 to 19.

If the defendant claims an interest or easement in, or incumbrance upon, said property, then the proceedings are the same as in action to enforce said easement or foreclose said lien or incumbrance.

Code, § 1642.

See proceedings to foreclose mortgage, pages 178 to 185.

Title in remainder or reversion.

When the defendant claims the property by virtue of an estate in remainder or reversion, he need not establish his right to immediate possession, but a decision in his favor should specify the time when, or the contingency upon which he will be entitled to possession, and final judgment rendered accordingly.

Code, § 1643.

Damages.

But he is not entitled to recover damages (for the withholding).

Code, § 1643.

Execution for delivery.

An execution for the delivery of the possession of the property can only be issued upon application to the court, upon proof that the time has arrived when, or the contingency has happened, upon which the applicant is entitled to possession under the judgment.

Code, § 1643.

Judgment for possession.

When final judgment determines that defendant is entitled to the immediate possession of the property, it must award him possession accordingly; also damages for the withholding of his property.

Code, § 1644.

Final judgment for plaintiff.

Final judgment in favor of the plaintiff must be to the effect that the defendant and every person claiming under him since the filing of the judgment or *lis pendens* shall be forever barred from any claim to the property or any easement in or lien or incumbrance upon the same.

Code, § 1645.

The court may direct that any instrument, purporting to create any interest in, or lien or incumbrance upon said property, be delivered up and canceled of record.

Code, § 1645.

Judgment by default; no costs.

If judgment was taken upon the defendant's default in appearing or pleading, it shall not award costs to either party unless it be taken upon a default in answer after a decision of a demurrer to the complaint.

Code, § 1645.

New trial.

A new trial of said action after judgment shall not be granted as a matter of right, but the court may, in the interest of justice, grant a new trial upon an application made by any party within one year after said judgment.

Code, § 1646.

But if the defendant is legally incapacitated or confined in prison for a term of less than life, shall have one year after the disability is removed, or his representatives, if the death of the said defendant occur during his disability.

Code, § 1646.

Evidence upon former trial.

Upon a new trial the record of the evidence given upon the previous trial may be again offered by either party, and be received in evidence in case the same evidence cannot be again procured. The courts may make such rules and orders as to preserving the record of the evidence given in such actions, and perpetuating the proofs produced therein, as shall be necessary and proper, and may embrace such directions in the judgment.

Code, § 1646.

Defendant who claims no interest.

A defendant who claims no interest should appear and disclaim in order to avoid costs, and this will throw the burden upon the plaintiff to prove that defendant has claimed an interest, and if plaintiff fails to so show, defendant is entitled to a dismissal of the complaint as to him, with costs.

Davis v. Read, 65 N. Y. 566; Ruger v. Collins, 8 Hun, 384.

Costs.

The court may allow an extra allowance.

Fisher v. Hepburn, 48 N. Y. 41; Code, § 3252.

PRECEDENTS.

Lis Pendens.

(See text, page 11.)

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

Notice is hereby given that an action has been commenced and is now pending in this court upon complaint of the above-named plaintiff against the above-named defendant, to determine the claim to certain real property mentioned in said complaint affected by said action; and that, at the time of the commencement of this action, and at the time of the filing of the notices stated, the said property was situated in the county of Fulton and State of New York, and is described in said complaint as follows, to wit: (Description.)

Yours, etc.,

JOHN C. MASON,
Plaintiff's Attorney.

Office and post-office address,
Cor. Main and Market Streets,
Johnstown, N. Y.

To the Clerk of the County of Fulton:

Sir.— You are hereby directed to index the foregoing notices to the name of the above defendant.

Yours, etc.,

JOHN C. MASON,
Plaintiff's Attorney,
Johnstown, N. Y.

Complaint in an Action to Determine Claim to Real Property.

(See text, page 242.)

(Title of the cause.)

The plaintiff complains of the defendant, and shows the following facts to the court:

First. Plaintiff alleges that heretofore and on the day of , 189 , he was the owner in fee, and entitled to the possession of all that real property situate in the county of Fulton and State of New York, bounded and described as follows: (Description.)

Second. Plaintiff further alleges that his estate in said property arises out of the following facts, to wit: That heretofore and on the day of , 189 , one , died, leaving a last will and testament, by which said last will and testament, which was dated on the day of , 189 , and which was duly admitted to probate in the Surrogate's Court of the county of Fulton, and recorded in the office of the clerk of the county of Fulton, in Book of Deeds No. 72, at page 400, etc., on the day of , 189 ; and by which said last will and testament this plaintiff was devised the premises hereinabove described; and that immediately after the death of the said testator, and the probate of the said will, he entered into possession of said premises, and has been in possession of the said premises for a term of one year and over before the commencement of this action.

Third. Plaintiff further alleges that the defendant unjustly claims an estate therein in said lands and premises, for a term of years not less than ten, by virtue of a lease made and executed by one , under and by virtue of which said lease the defendant claims to be entitled to have an interest in said property, and molests and interferes with the quiet enjoyment of the possession of this plaintiff, which said claim the defendant has made

adversely to the title of this plaintiff before the commencement of this action.

Wherefore, plaintiff demands judgment against the defendant and all persons claiming under him, and that they may be forever barred of all claim in and to the said property, or any claim to or interest therein, or any lien or incumbrance therein, and that he may be forever barred from molesting or interfering with the quiet enjoyment of the plaintiff in and to the premises hereinabove described; and that the plaintiff may have the costs and expenses of this action.

JOHN C. MASON,

Plaintiff's Attorney,

Office and post-office address,

Cor. Main and Market Streets,

Johnstown, N. Y.

(Verification.)

Complaint in Void Deed.

(See text, page 241.)

The plaintiff complains of the defendant, and shows the following facts to the court:

First. Plaintiff alleges that heretofore and on the day of , 189 , plaintiff was seized in fee and entitled to the possession of all that real property situate in the county of Fulton and State of New York, bounded and described as follows, to wit: (Description.)

Second. For a further cause of action the plaintiff alleges that he was so seized in fee of the said described premises by virtue of a deed of conveyance executed to this plaintiff by one , which said deed was dated on the day of , 189 , and was duly recorded in the office of the clerk of the county of Fulton, on the day of , 189 , in Book of Deeds No. 90, at page 102, etc.

Third. Plaintiff further alleges that the defendant herein unjustly claims an estate in said lands and premises by virtue of a deed of conveyance which said defendant claims to have and hold of said _____, who was the grantor in plaintiff's deed, but that said deed of the defendant's is null and void, and of no effect, and that the defendant molests and interferes with the quiet enjoyment of this plaintiff.

Wherefore, plaintiff demands judgment against the said defendant and all persons claiming under him; and that said deed may be declared null and void; and that the defendant and all persons claiming under him may be forever barred of all claim in and to the said premises above described, and that he be forever enjoined from interfering and molesting with the quiet enjoyment of this plaintiff, in and to the said premises, and that the plaintiff have the costs and expenses of this action.

JOHN C. MASON,
Plaintiff's Attorney,
Johnstown, N. Y.

(Verification.)

Complaint in Action to Determine Dower.

(See text, page 125.)

(Title of the cause.)

The plaintiff complains of the above-named defendant, and respectfully shows to the court the following facts:

First. That he is the owner of an estate in fee of the real property described as follows: (Description.)

Second. That the defendant _____, claims to have a right of dower in the whole of said premises (or if the claim is to a part of said described premises then describe what part), as the widow of _____, deceased, who died more than four months before the commence-

ment of this action, to wit, on the day of ,
189 ; that said defendant as said widow of ,
deceased, is of full age, and in all ways competent to hold
in her name said dower right, and is not imprisoned upon
any criminal charge, and under execution for no criminal
offense.

Third. Plaintiff further alleges, upon information and
belief, that said defendant has no right of dower in said
described property, or in any part thereof.

Wherefore, plaintiff demands judgment, and that the
said defendant may be forever barred of any claim of
dower in and to the said described property, and that the
plaintiff may have the costs of this action.

JOHN C. MASON,
Plaintiff's Attorney.

Office and post-office address,
Cor. Main and Market Streets,
Johnstown, N. Y.

(Verification.)

(NOTE.— If plaintiff admits defendant's dower right
then ask judgment that it be admeasured.)

Final Judgment.

(See text, page 246.)

(Title of the cause.)

The above-entitled action having been brought on for
trial before Justice Stover and a jury, at a Trial Term of
this court, which said court was held at the Court House
in the city of Johnstown, county of Fulton and State of
New York, on the day of October, 1897, and the
jury having found a verdict in favor of the plaintiff, and
that the plaintiff is entitled to the property described in
the complaint of the plaintiff; it is, therefore,

Adjudged, That pursuant to said verdict the defendant herein, and all persons claiming under him by title accruing after final judgment in this action, or filing the notice of the pendency of this action, be forever barred of any and all claim to and in the said premises, or any estate of inheritance for life or for a term of years not less than ten, which said property is described as follows, to wit: (Description); and it is further

Adjudged, That any and all instruments purporting to create any interest, easements, liens or incumbrance in and to the said described property, be delivered up and canceled of record; and it is further

Adjudged, That the plaintiff have and recover of the defendant the sum of dollars, as his costs and disbursements in this action, to be taxed, and that execution do issue therefor.

C. H. BUTLER,

County Clerk, Fulton County.

(NOTE.—This form of a judgment can be used if the defendant recover, placing the name of the defendant in place of that of the plaintiff.)

(NOTE.—In an action to determine the widow's dower the judgment will be the same as in favor of the plaintiff, if the court find that the defendant is not entitled to dower, but if the defendant is entitled to dower then a referee will be appointed to admeasure her dower right in said property, the same as in an action for dower.)

(The proceedings are the same as in action in ejectment, which see ante, page , for further forms.)

CHAPTER VI.

OTHER ACTIONS AFFECTING TITLE TO REAL PROPERTY.

Mechanic's lien on real property.

A contractor, sub-contractor, laborer or materialman who performs labor or furnishes materials for the improvement of real property, with the consent and at the request of the owner thereof, or of his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value or the agreed price of such labor or materials upon the real property improved, or to be improved, and upon such improvement from the time of filing a notice of such lien as prescribed in this article.

Laws 1897, ch. 418, § 3.

Extent of lien.

Such lien shall extend to the owner's right, title or interest in the real property and improvements existing at the time of filing the notice of lien.

Id., § 4.

What the notice of lien shall state.

The notice of lien shall state:

1. The name and residence of the lienor.
2. The name of the owner of the real property and the notice of the owner as far as known.
3. The name of the person by whom the lienor was employed or to whom he furnished or is to furnish material, or if the lienor is a contractor or sub-contractor, the person with whom the contract was made.
4. The labor performed or to be performed, or materials furnished or to be furnished, and the agreed price or value thereof.
5. The amount unpaid for such labor or materials.
6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof, sufficient for identification, and if in a city or village, the street and number, if known.

Id., § 9.

Verification.

The notice must be verified by the lienor or his agent to the effect that the statements therein contained are true to his knowledge as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Id.

Filing of the notice.

The notice of the lien may be filed at any time during the progress of the work and the furnishing of the materials, or within ninety days after the completion of the contract or the final performance of the work, or the final furnishing of the materials, dating from the last item of the work performed or the materials furnished.

Id., § 10.

Where filed.

The notice of lien must be filed in the clerk's office of the county where the property is situated, and if the property is situated in two or more counties, then in the office of the clerk of each of such counties.

Id., § 10.

Duration of lien.

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless an action has been commenced in that time to foreclose the lien and a notice of the pendency of such action, whether in a court of record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed containing the names of the parties to the action; the object of the action; a brief description of the property affected thereby, and the time of filing the notice of the lien.

Id., § 16.

Order extending lien.

An order may be granted within one year from the filing of such notice by a court of record continuing such lien, and such lien shall be redocketed as of the date of granting such order, and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year.

Id.

Foreclosure of mechanic lien.

Any person who has duly filed a notice of lien as provided by section 10 of the Laws of 1897, chapter 418, may enforce his claim against the property therein mentioned by a civil action.

Laws 1897, ch. 418, § 10.

Enforcement.

A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded by an action by a lienor, his assignee or legal representatives, in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.

Code, § 3399.

Actions the same as foreclosure.

The provisions of this Code relating to actions for the foreclosure of a mortgage upon real property and the sale and distribution of the proceeds thereof, apply to actions in a court of record to enforce mechanic's liens on real property, except as otherwise provided in this title.

Code, § 3401.

County court jurisdiction.

The County Court has jurisdiction within its limitation where the property is situated in the county although the defendant does not live within said county.

Raven v. Smith, 148 N. Y. 415.

When action can be brought.

The action cannot be brought until the money or some part thereof claimed, is due.

Ringle v. Wallis Iron Works, 85 Hun, 279.

Foreclosure is not a bar to suit.

Unlike a mortgage foreclosure the pendency of an action on the claim is no bar to a suit to foreclose.

Raven v. Smith, 71 Hun, 197; Bryson v. St. Helen, 79 Hun, 167.

When action must be brought.

No lien shall be binding for more than one year unless the action is commenced or an order of the court continuing such lien.

Laws 1897, ch. 418, § 18.

Lis pendens.

There must be a filing of a notice of pendency of the action, which said notice must contain the names of the parties to the action, a description of the premises affected thereby and the time of filing the notice of lien.

Id.

Liens enforced.

Whenever anyone who claims to have a lien is made a party defendant in an action to enforce another lien, such action shall be deemed an action to enforce said defendant's lien.

Id.

Effect of filing lis pendens.

Even if an action has been commenced and tried, the lien expires in one year if no notice of the pendency of the action has been filed.

Mushlitt v. Silverman, 50 N. Y. 360.

Prior v. White, 32 Hun, 14; but see Haag v. Hillemeier, 41 Hun, 390.

Time, and how computed.

In computing the time in which to get an order extending the lien, the day on which it is filed is to be excluded.

Haden v. Buddensick, 6 Daly, 8.

The complaint must be filed with the lis pendens.

Albro v. Blumae, 5 App. Div. 309.

If a lien is in force at the time of the foreclosure of a mortgage, the lienor may come in on proceedings for surplus without extending his lien.

Emigrant Indus. Sav. Bk. v. Golden, 75 N. Y. 127.

PARTIES TO THE ACTION.

Who may be joined as plaintiffs.

Two or more lienors having liens upon the same property, or any part thereof, may join as plaintiffs.

Code, § 3402.

Parties defendant.

In an action in a court of record, the following are necessary parties defendant:

1. All lienors having liens against the same property, or any part thereof.

2. All other persons having subsequent liens or claims against the property by judgment, mortgage or otherwise.

3. All persons appearing by the records in the office of the County Clerk, or registered to be overseers of such property, or any part thereof.

Code, § 3402.

No personal claim.

As to all parties against whom no personal claim is made, the plaintiff may serve with the summons a notice of no personal claim stating briefly the object of the action.

Laws 1885, ch. 342, § 17.

Answer by defendant.

Every defendant who is a lienor, shall, by answer in the action, set forth his lien or he will be deemed to have waived the same unless the lien is admitted in the complaint, and not contested by another defendant.

Code, § 3402.

Equities to be determined.

The court may adjust and determine the equities of all the parties, and the order of priorities of different liens,

and determine all issues raised by any defense or counter claim.

Code, § 3403.

Courts not of record.

These proceedings do not apply to courts not of record.

Persons not necessary.

Owners, grantors or assignors, prior to the filing of the lien, are neither proper or necessary parties.

Southard v. Moss, 2 Misc. 121.

Equitable proceeding.

Foreclosure is an equitable proceeding and when necessary, other parties may be brought in.

Brown v. Welch, 5 Hun, 582.

PROCEEDINGS.

The complaint.

The complaint must state all the facts which are necessary to the lien and the right to enforce the same.

Bailey v. Johnson, 1 Daly, 61; Foster v. Poillon, 2 E. D. Smith, 556.

Jurisdictional facts.

The complaint, as well as the notice of lien, must also state the nature and amount of labor and service performed or of materials furnished or to be furnished, also that the work for which the claim is made has been actually performed or that the material has been actually furnished and if not, how much of it has been done or furnished. These facts are necessary to confer jurisdiction upon the court.

McKinney v. White, 15 App. Div. 423; Davidsburgh v. Knickerbocker Life Ins. Co., 90 N. Y. 526.

Description of the property.

The description of the property must be set forth so as to identify it.

Duffy v. McMannis, 3 E. D. Smith, 357.

Contract complied with.

It must state that the contract has been fully complied with.

Jaques v. Morris, 2 E. D. Smith, 639.

Notice of lien was filed.

It must state that the notice was properly filed and when and where.

Schillinger Fire Proof Co. v. Arnot, 14 Supp. 326.

Where judgment has been obtained.

It must state that when a judgment has been obtained upon the debt, that an execution has been returned unsatisfied.

Barbig v. Keck, 25 Civ. Pro. Rep. 52.

Transfers to defeat the lien.

It may state facts to set aside any transfer made for the purpose of defeating the lien.

Tisdale v. Moore, 8 Hun, 19.

Sub-contractors.

In an action by sub-contractor, it must allege that there was a contract between the owner and the alleged contractor, and that there remains a sum unpaid by the owners thereon, or was at the time of the filing of the notice.

Raube v. Squire, 148 N. Y. 81.

Failure to prove the lien.

If plaintiff prove a complete cause of action for work and labor performed, or services and material furnished, he still may recover a personal judgment, notwithstanding he may fail on his lien.

Snaith v. Smith, 7 Misc. 37.

Answer.

When the action is for materials furnished a contractor, the defendant may show that the contractor has not completed his work and what it will cost to complete it.

Frazier v. McGuckin, 9 Supp. 435.

Counterclaim.

The defendant may set up a counterclaim between the contractor and sub-contractor and between the owner and contractor.

Hayti v. Miner, 7 Hill, 525.

A counterclaim based upon false representations cannot be interposed.

Marshall v. Cohn, 11 Misc. 397.

Defenses must be pleaded.

In order to avail himself of his defenses, defendant must plead them.

Am. & Eng. Ency., Vol. 15, p. 173.

General denial.

A general denial only puts the plaintiff upon proof of all facts necessary to show that he is entitled to a lien and to foreclose the same.

Id., p. 174.

If defendant pleads payment, he cannot take advantage of the invalidity of the lien he is estopped.

Id., p. 175.

Evidence.

A certified copy of the notice of the lien shall be received in evidence, and is prima facie of the execution and filing of the original.

Laws 1885, ch. 342, § 8.

Costs and disbursements in court of record.

If an action is brought to enforce a mechanic's lien against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party.

Code, § 3411.

Costs included in the judgment.

The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are to be paid.

Code, § 3411.

Consolidation.

If actions are brought by different lienors in a court of record, the court in which the first action was brought, may, upon its own motion, or upon the application of any party in any of such actions, consolidate all of such actions.

Code, § 3401.

Offer to pay into court.

At any time after an action is brought the owner may make and file with the clerk with whom the notice of lien is filed, if in a court of record. If in a court not of record,

then with the court, to offer to pay into court the sum of money stated therein, and to execute and deposit securities in discharge of the lien and serve upon the plaintiff a copy of such offer.

Code, § 3413.

Acceptance of offer.

If a written acceptance of such offer is filed with the clerk or court within ten days after its service, and a copy of the acceptance is served upon the party making the offer, the court, upon proof of such offer and acceptance, may make an order that on deposit with such clerk, or court, the sum so offered or the securities described, the lien shall be discharged and the moneys or securities deposited shall take the place of the property upon which the lien existed, and shall be subject to the lien. If the offer is of money only, the court, on application and notice to the plaintiff, may make such order without the acceptance of the offer by the plaintiff. Money or securities deposited upon the acceptance of an offer pursuant to this section, shall be held with the clerk or the court until the final determination of the action, including an appeal.

Code, § 3413.

Priority.

When there are several liens, the court must in every case, determine the priority of each and the proceeds of the sale must be applied in the order of the priority.

Laws 1885, ch. 342, § 21.

How lien discharged.

1. By the certificate of the lienor duly acknowledged or approved and filed in the office where the notice of lien is filed, stating that the lien is satisfied and may be discharged.

2. By failure to begin an action to foreclose such lien or to secure an order continuing it within one year from the time of filing of the notice of lien.

3. By order of the court vacating or canceling such

lien of record for neglect of the lienor to commence action as provided by the Code of Civil Procedure, section 3417.

4. Either before or after the beginning of an action by the owner executing an undertaking with two or more sufficient sureties who shall be freeholders to the clerk of the county where the premises are situated, in such sums as the court, or judge, or justice thereof may direct, for not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien.

5. By a deposit with the County Clerk and payment of money into court, as provided by section 3413, Code of Civil Procedure.

Laws 1897, ch. 418, §§ 18 and 19.

Deposit.

A deposit is only a substitute for the property and does not discharge the lien, and the lienor must establish his claim just the same.

Matter of Dean, 83 Hun, 413.

When not to file notice of action.

When a deposit has been made, it is not necessary to file a *lis pendens* because the real estate is not affected.

Ward v. Kilpatrick, 85 N. Y. 413.

Evidence declaration.

Declarations of defendant's representatives in charge of the work are admissible in evidence in behalf of plaintiff.

Keogh Manfg. Co. v. Eisenbery, 7 Misc. 79.

Trial by court.

Action to foreclose is triable by the court without a jury except upon issues that are settled.

Kenny v. Apgar, 93 N. Y. 550.

What tried by a jury.

But a party can have, by an order, the amount of his claim tried by a jury.

Schillinger Fire Proof Co. v. Arnot, 14 Supp. 326.

Question of damages.

The question of the value and damages and where a counterclaim is set up for damages sustained by delay in the completion of the contract must, unless waived, be tried by jury.

Riggs v. Shannon, 21 Civ. Pro. Rep. 434; Bradley & Currier Co. v. Herter, 23 Civ. Pro. Rep. 408; as to a reference, see Tooker v. Rinalds, 11 Hun, 154.

The lien of a defendant cannot be canceled by motion of another defendant who served no notice of trial upon said defendant.

Mahoney v. McWalters, 91 Hun, 247.

How judgment enforced.

The purchaser at foreclosure is put into possession by the writ of assistance.

Connor v. Schaeffel, 19 Civ. Pro. Rep. 378.

Burden of proof.

The burden is on the claimant to establish his lien and on the sub-contractor to show that the moneys to which he claims his lien attaches, are due from the owner to the contractor.

Taylor v. Baldwin, 10 Barb. 626.

Costs.

Costs are in the discretion of the court.

Carney v. Riley, 18 Misc. 11.

An additional allowance.

An additional allowance under section 3352 of the Code, cannot be allowed.

Wright v. Reusens, 39 St. Rep. 802.

Costs against the owner.

Where the owner defends the action, the court may compel him to pay costs in addition to the sum due the contractor.

Kenny v. Apgar, 93 N. Y. 535.

Discharge to avoid costs.

The owner, to protect himself from costs, must discharge the lien by deposit.

Williamson v. Hendricks, 10 Abb. 98.

Judgment in case of failure to establish lien.

If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this title, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract against any party to the action.

Code, § 3412.

Personal judgment.

If plaintiff or any claimant fails to establish his lien for any cause, he can nevertheless have personal judgment for whatever amount he can show justly due him, said judgment will be against the party or parties against whom he could recover on his contract.

Altieri v. Lyons, 37 St. R. 881; *Crouch v. Moll*, 28 St. R. 48.

Transcripts.

When a judgment is rendered in a court not of record, the justice or judge of the court in which it is tried, or other person authorized to furnish transcripts of judgments therein, shall furnish the successful party a transcript thereof, which may be filed with the clerk of the county with whom the notice of lien is filed. The filing of such transcript has the same effect as the filing of a transcript of any other judgment rendered in such courts.

Code, § 3410.

Judgment for deficiency.

Judgment for deficiency may be had and entered in like manner and with like effect as in actions of foreclosure of mortgage.

Laws 1885, ch. 342, § 23; Code, § 3416; see, ante, p. —.

Form of judgment.

A judgment directing a recovery of the whole amount of the lien which also directs a sale of the premises and in case of a deficiency that plaintiff have judgment and execution against the owner thereof, is proper.

Decker v. O'Brien, 1 App. Div. 81.

Judgment must direct sale.

A judgment must direct a sale of the owner's interest in the property and prescribe the manner in which the proceeds shall be distributed.

Eaghorn v. Clark, 2 E. D. Smith, 644; Mehan v. Williams, 2 Daly, 367.

Judgment.

If the owner has agreed to deliver bills, notes, securities or other obligations, or any other specie of property in payment of the debt upon which the lien is based, the judgment may direct that such substitute be delivered or deposited as the court may direct, and the property affected by the lien cannot be sold by virtue of such judgment except in default of the owner to so deliver or deposit within the time directed by the court.

Code, § 3415.

Discharge of the lien.

A mechanic's lien on real property may be vacated and canceled by an order of the court of record. Before such order shall be granted a notice shall be served upon the lienor, either personally or by leaving it at his last known place of residence with a person of suitable age, with direction to deliver to the lienor.

Code, § 3417.

What the notice shall contain.

Such notice shall require the lienor to commence an action to enforce the lien within a time specified in the notice, not less than thirty days from the time of service, or show cause at a Special Term of court of record, or at a County Court in the county in which the property is situated, at a time and place specified therein, why the notice of lien filed should not be vacated and canceled of record.

Code, § 3417.

Proof of service.

Proof of such service and that the lienor has not commenced the action to foreclose such lien as directed in the

notice, shall be made by affidavit at the time of applying for such order.

Code, § 3417.

Appeal.

A sub-contractor is entitled to have a judgment reviewed when an appeal has been taken, although he has not served a notice of appeal.

Murdock v. Jones, 3 App. Div. 221.

Foreclosure in courts not of record.

An action which does not exceed in value its jurisdiction, may be brought in a court not of record.

Laws 1885, ch. 342, § 9.

Complaint in court not of record.

The complaint must set forth specifically all facts contained in the notice of lien, and the substance of the agreement under which the labor was performed, or the materials were furnished.

Code, § 3404.

Actions in court not of record.

If an action to enforce a mechanic's lien against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner anywhere within the State, of a summons and complaint, verified in the same manner as a complaint in an action in a court of record.

The form and contents of the summons shall be the same as provided by this Code for the commencement of an action upon a contract in such court. (Code, sec. 417.) The summons must be returnable not less than twelve nor more than twenty days after the date of the summons; or, if service is made by publication, after the day of the last publication of the summons. Service must be made at least eight days before the return day.

Code, § 3404.

When personal service cannot be made.

If personal service of the summons cannot be made upon a defendant in an action in a court not of record, by reason of his absence from the State, or his conceal-

ment therein, such service may be made by leaving a copy thereof at his last place of residence and by publishing a copy of the summons once in each of three successive weeks in a newspaper in the city or county where the property is situated.

Code, § 3405.

Proceedings on return of summons.

At the time and place specified in the summons for the return thereof, in a court not of record, issue must be jointed if both parties appear, by the defendant filing with the justice a verified answer containing a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof, or any other matter constituting a defense to the lien or to the claim upon which it is founded.

Code, § 3406.

Judgment by default.

If the defendant fail to appear on the return day, on proof by affidavit of the service of the summons and complaint, judgment may be rendered for the amount claimed, with costs.

Code, § 3406.

Execution.

Execution may be issued thereon as on other judgments except the execution shall direct the officer to sell the right, title and interest of the owner or other person in interest as aforesaid in the premises upon which the claim is a lien at the time of filing the notice.

Code, § 3408; see *Egan v. Laemmle*, 5 Misc. 226.

Issue, how tried.

If issue is joined in such action in a court not of record, it must be tried in the same manner as other issues in such court.

Code, § 3407.

Judgment in favor of plaintiff; how enforced.

Judgment thereon shall be enforced when in favor of the plaintiff by an execution against real property in court not of record, directing the officer to sell the title

and interest of the owner of the premises upon which the lien set forth in the complaint existed at the time of filing the notice of lien.

Code, §§ 3407 and 3408.

Judgment in favor of defendant.

Judgment in favor of the defendant is enforced in the same manner as in an action on a contract in such court.

Code, § 3407.

Appeals from court not of record.

An appeal may be taken from a judgment rendered in a court not of record according to the provisions of this Code, regulating appeals from judgments in actions on contract in such court.

Code, §§ 3409 and 1293-1323.

Costs in court not of record.

If such an action is brought in a court not of record, costs shall be the same as allowed in civil actions in such court, except the expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court.

Code, § 3411.

PRECEDENTS.

(See text, page 266.)

To John White:

Take notice, you are hereby required to commence an action to enforce and foreclose a certain lien which you have, by virtue of a notice heretofore filed in the County Clerk's office in the county of Fulton on the day of , 189 , which is a lien and incumbrance against the following described property: (Description), which said action you are hereby required to commence within forty days from the time this notice is served upon you or to show cause at a Special Term of the Supreme Court, to be held in the city of Amsterdam, N. Y., on the day of , 189 , at the opening of said court or as soon thereafter as counsel can be heard, why said notice of lien filed shall not be vacated and canceled of record.

Dated Johnstown, this day of , 189 .

.....

(NOTE.—This notice must be served not less than thirty days and to show cause either at a Special Term of the court of record or at the County Court of the county where the property is situated.)

(See text, page 266.)

SUPREME COURT.

In the Matter of the Application to Require JOHN WHITE, Lienor, to Commence Action to Enforce a Mechanic's Lien.

STATE OF NEW YORK, }
County of Fulton, } ss.:

, being duly sworn, says that he is a person over twenty-one years of age, and that he is acquainted with John White, the person named in the notice hereto annexed, and that on the day of , he served the foregoing and annexed notice upon said John White in the city of Johnstown, Fulton county, N. Y., by delivering to and leaving with him personally a true copy thereof (or by leaving a true copy thereof at his last known place of residence with a person of suitable age, with directions to deliver it to said John White.)

.....
(Sig.)

Subscribed and sworn to before me
this day of , 189 .

.....
Notary Public.

(See text, page 266.)

SUPREME COURT.

In the Matter of the Application to Require JOHN WHITE, Lienor, to Commence Action to Enforce a Mechanic's Lien.

STATE OF NEW YORK, } ss.:
County of Fulton, }

Frank L. Anderson, being duly sworn, says that he is attorney for the applicant herein and that the lienor, John White, herein, has not taken any proceedings and has not commenced any action to foreclose the lien which he has by virtue of a mechanic's lien against the property described in the notice hereto annexed, and that more than forty days have elapsed since the service of said notice upon said lienor.

..... Sig.

(Jurat.)

(See text, page 266.)

At a Special Term of the Supreme Court, held in
the city of Amsterdam, on the day of
 , 189 .

Presiding — Hon. M. L. Stover, Justice.

SUPREME COURT.

In the Matter of the Application to Require JOHN WHITE, Lienor, to Commence Action to Enforce a Mechanic's Lien.

It appearing to the court that one John White has a lien, by virtue of filing a notice of mechanic's lien, against the following property: (Description), and it also appear-

ing to the court that due notice has been given said John White to commence an action to enforce said lien, which said notice was duly served upon said John White more than thirty days prior to this application; and it also further appearing to the court that said lienor has not commenced such action to foreclose such lien as directed in the notice, now on motion of Frank Anderson, appearing for applicant; Harwood Dudley appearing in opposition thereto. It is Ordered and Adjudged that said lien, and the notice thereof, which was filed in the County Clerk's office on the day of be and the same is hereby vacated and canceled of record, and the property herein described be and the same is hereby released from said lien.

Enter in Fulton.

M. L. S.,
J. S. C.

Summons and Notice.

(See text, page 258.)

SUPREME COURT.

Trial Desired in Fulton County.

, Plaintiff,
against
, Defendants.

To the above-named defendants:

Take notice, That the object of the above-entitled action, in which a summons is herewith served upon you, is to foreclose a certain lien bearing date the day of , 189 , made and filed by the above-named plaintiff upon the premises hereinafter described and duly entered and docketed in the office of the clerk of

county in the lien docket, as required by law, and that the property affected thereby is situated in the county of _____, and is described in said lien and in the complaint herein as follows: (Description.)

That no personal claim is made against you.

Dated the _____ day of _____, 189 _____.

HARWOOD DUDLEY,

Plaintiff's Attorney,

Johnstown, N. Y.

Lis Pendens.

(See text, pages 257, 263.)

SUPREME COURT — COUNTY OF FULTON.

JOHN G. WHITE, Plaintiff,

against

SAMUEL E. FOX, Defendant.

To the County Clerk of Fulton County:

Notice is hereby given, that an action has been commenced and is now pending in this court by the above-named plaintiff, John G. White, against the above-named defendant, Samuel E. Fox; the object of said action is to foreclose a mechanic's lien, notice of which said lien or claim was duly filed in the office of the County Clerk of the county of Fulton on the _____ day of _____ 189 _____; the premises which said action is brought against are described as follows: (Description.)

Yours, etc.,

H. W. THORNE,

Plaintiff's Attorney.

Office and post-office address,

People's Bank Building, Johnstown, N. Y.

To the Clerk of the County of Fulton:

Sir.— Please index the foregoing notice against the defendant, Samuel E. Fox.

Yours, etc.,

H. W. THORNE,

Plaintiff's Attorney.

(NOTE.— Time expires in one year if no notice is filed.
See text, page .)

Complaint for Materialman.

(See text, page 260.)

SUPREME COURT — COUNTY OF FULTON.

, Plaintiff,
against
, Defendants.

The above-named plaintiff, complaining of the above-named defendants, upon information and belief, alleges:

I. That between the day of and the
 day of , 189 , the said defendant, ,
 being the owner of the premises hereinafter described,
 purchased of this plaintiff certain lumber, timber, win-
 dows, shingles, cement and other building materials, to
 the amount of \$, and the same was actually pur-
 chased for use in building, erecting and constructing of a
 building, shop and appurtenances then to be erected and
 constructed upon the premises of the said defendants
 hereinafter described; that the same was furnished and
 delivered during the year 189 , as aforesaid, at the
 request of the said defendant, ; that on the
 day of , 189 , there was a balance unpaid
 thereon of \$.

II. That the premises upon which the said building, shop and appurtenances was erected and constructed, and upon which the said materials furnished as aforesaid by this plaintiff were used, was and still is owned by the said defendant, _____, and described as follows: (Description.)

III. That at the time of the filing of the lien herein-after mentioned, there remained unpaid and due to this plaintiff thereon for the materials so furnished and used, the sum of \$ _____, with interest thereon from the day of _____, 189 ____.

IV. That on the _____ day of _____, 189 ____, and within ninety days after the furnishing of said materials, for which said lien was claimed, dated from the last item of material furnished, this plaintiff filed a notice of such lien, in writing, in the clerk's office of the county of _____, the county in which the property against which such lien is claimed, is situated; that said notice of lien was duly verified, and complied in all respects with the requirements of the statutes of the State of New York, in respect to liens, and the same was, on the date last mentioned, duly entered and docketed by said clerk in the lien book kept in said office, stating all the particulars required by said statutes, a copy of which is hereto annexed marked Exhibit A, and made a part of this complaint, and that thereafter and within ten days after the filing of said notice of lien, this plaintiff caused a copy thereof to be served upon the defendant, _____.

V. Upon information and belief, that on the _____ day of _____, 189 ____, the defendant, _____, made and filed a lien upon said premises for the sum of \$ _____, and now claims a lien thereon.

(Here state any and all liens against the property of record.)

That the defendant, _____, is the wife (or husband)
of the defendant, _____.

VI. That no part of the plaintiff's claim as set forth
in said notice of lien has been paid, and that there is now
justly due and owing to him on account thereon, the sum
of \$ _____, with interest from the _____ day of _____,
189 ____.

Wherefore, the plaintiff demands judgment that he
recover of the defendant, _____, the sum of \$ _____,
with interest thereon from the _____ day of _____,
189 ____, together with his costs and disbursements; that he
be adjudged to have the lien on the premises described in
the notice of lien herein for the sum of the amount of said
judgment, with interest thereon, and that the defendants,
and all persons claiming under them, or either of them, be
forever foreclosed of all equity of redemption or other
interest in said premises; that the said premises be sold
as provided by law, and the priority of the several liens
be ascertained, and that the said liens be paid in the order
of their priority as so ascertained, and that out of the
proceeds of said sale the plaintiff be paid the amount of
his said claim, with interest, and expenses of sale and the
costs of this action, and that the defendant, _____,
be adjudged to pay any deficiency that may remain after
applying all said moneys so applicable thereto; that the
plaintiff have such other and further relief as may be
necessary and proper in the premises to protect his rights.

HARWOOD DUDLEY,

Plaintiff's Attorney,

Johnstown, N. Y.

(Jurat.)

Complaint for Contractors.

(See text, page 259.)

SUPREME COURT — COUNTY OF

JOHN DOE, Plaintiff,

against

RICHARD ROE, Defendant.

The plaintiff complains of the defendant and alleges as follows:

First. That at the time hereinafter mentioned, the defendant was and still is the owner of the following real estate, situated in the city of _____, and described as follows: (Insert full and complete description.)

Second. That on the _____ day of _____ the plaintiff herein entered into a written contract with this defendant, a copy of which is hereto annexed, marked Exhibit "A," and is a part of this complaint, and is to be taken as if herein set forth in full (if the contract is not in writing, set forth the substance of the contract).

Third. Plaintiff further alleges that he did in all things duly perform for the defendant the work and furnished the materials provided for in said contract, and said work was performed and said materials were furnished toward and actually used in the erection (altering or repairing) of the building mentioned in the contract aforesaid, on the property above described; that the plaintiff duly fulfilled all the conditions of said contract on his part to be performed, within the time therein specified, and on the _____ day of _____, at the time of the filing of the lien hereinafter mentioned, plaintiff became entitled to receive from defendant the sum of \$ _____, which sum has not been paid (except the sum of \$ _____), and that there is now due and owing plaintiff from defendant the sum of \$ _____ under said contract.

Fourth. That on the day of , 189 , and within ninety days after the completion of the contract above set forth, the plaintiff filed a notice of lien, in writing, in the clerk's office of the county in which the property aforesaid, against which a lien is asserted, is situated, on and against the said premises for the amount of labor and materials aforesaid, to wit, \$; that said notice of lien contained the name and residence of the claimant, this plaintiff, the nature and amount of the labor performed and the material furnished, with the name of the owner as herein above given; the name of the person by whom plaintiff was employed, together with a statement that the work for which the claim was made had been actually performed and materials actually furnished, and also contained a description of the property to be charged with the lien, sufficient for identification; that said notice of lien was duly verified and complied in all respects to the requirements of the statutes in such cases made and provided; that on the day of , 189 , said lien was duly entered and docketed by said clerk in the lien book kept in his office, a copy of which said lien is hereto annexed, marked Exhibit "B," and is made and taken as a part of this complaint, with the same force and effect as if herein set forth in full.

Fifth. That on the day of and within ten days after filing said notice of lien, plaintiff caused a copy of the same to be served upon the owner, the defendant herein.

Sixth. (Herein set forth any other liens or incumbrances against said property; the nature and condition of each, and if subsequent or prior to plaintiff's lien herein.)

Wherefore, plaintiff demands judgment:

First. That he have and recover of and from the defendant herein, the sum of \$, together with his costs and disbursements in this action.

(Jurat.)

Ordered, That the above-entitled action and the issues therein contained be and the same are hereby referred to

Fred. L. Carroll, Esq., a counselor-at-law, of the city of Johnstown, N. Y., as sole referee to hear and determine the same.

Enter in Fulton county.

M. L. STOVER,
J. S. C.

Report of Referee.

(See text, page 263.)

SUPREME COURT — COUNTY OF FULTON.

JOHN G. WHITE, Plaintiff, against SAMUEL E. FOX, Defendant.

To the Supreme Court of the State of New York:

I, Fred. L. Carroll, the referee named in the order herein, dated the day of , 189 , by which it was referred to me to hear and determine the same, do respectively report as follows:

First. That I have been attended by the parties to this action by their respective attorneys, and after having taken and subscribed the oath of office as required by law, upon pleadings and evidence of the respective parties, I find and decide as follows:

CONCLUSIONS OF FACT.

1st. That at the several times hereafter mentioned and prior to the day of , 189 , the defendant was the owner in fee of the lot of land described in the plaintiff's complaint in his action.

2d. That on or about the day of , 189 , the plaintiff made a contract with the defendant, whereby plaintiff agreed to construct for said defendant and furnish the material necessary in the building and completion of a house, which said house is located upon

said described property, for the agreed price of \$5,000, for said work and materials furnished.

3d. That thereafter and between the day of , 189 , and the day of , 189 , the plaintiff, in and pursuant to the terms of said contract as aforesaid, performed said work and did in all things construct and build said house and furnish the materials therefor in the construction of the same.

4th. That all of the work and materials furnished as were agreed to be were so performed and furnished for use, and that they were in actual use in the building and erection of said house upon the land described in said plaintiff's complaint, and were so performed and furnished in conformity with the terms and conditions of the contract as aforesaid, and that the said work was completed and materials furnished prior to the filing of the lien heretofore mentioned, and that said plaintiff became entitled to receive from the said defendant in and by the terms of said contract the sum aforesaid to wit, the sum of five thousand dollars (\$5,000).

5th. That said sum has not been paid, or any part thereof except the sum of \$3,000, and that the said defendant is now justly indebted to the said plaintiff in the sum of \$2,000, with interest thereon, from the date of the filing of the said lien.

6th. That within ninety (90) days after the building and construction of the aforesaid house, and on the day of , 189 , the plaintiff caused to be filed in the office of the clerk of the county of Fulton a notice of claim of a lien of and against the said building and property which is situated in said county of Fulton, for which said sum of \$2,000, the unpaid price of said work and materials, which said notice was filed in due form, as is prescribed and required by the statutes in such cases made and provided, and was duly filed according to law,

and that said lien was duly entered and docketed in said clerk's office of the county of Fulton, in the lien docket, kept in said office for that purpose.

7th. That said lien is not paid or any part thereof, and that no other action or proceeding has been had or commenced to recover the said debt to foreclose said lien, and that there is no other lien or claim by mortgage, judgments or action against the said property, and that one year has not elapsed since the filing of the said lien to the commencement of this action and the filing of the notice of the pendency of this action, which is brought to foreclose the same.

I find as conclusions of law that in and by virtue of the terms and conditions of the contract as aforesaid in the building and construction of the said house and the materials furnished therein, the defendant was, at the time of filing said lien, and now is justly indebted to the plaintiff in the sum of \$2,000, with interest thereon from the day of , 189 .

Second. That by virtue of the performance of said contract in doing the said work and furnishing said materials, and the filing and docketing of said lien, the plaintiff acquired and now has a good and valid mechanic's lien against and on the said property in and to the building and lands mentioned at the time of the filing of the same.

Third. That the plaintiff is entitled to a judgment against the defendant, foreclosing him of all right, interest, equity of redemption in and to the said premises and for a sale of all the right, title and interest of the defendant in said premises to the time of the filing of the lien, and for the payment to the plaintiff from the proceeds of such sale the sum of \$2,000, and interest thereon from the day of , 189 , to the date of this, my report, which sum amounts to the sum of \$, besides the costs and expenses of this action, which sum

is taxed at \$; and in case the proceeds of said property should be insufficient to pay the same so due the plaintiff, that the plaintiff herein may have a judgment against the defendant for the amount of any deficiency that may remain unpaid after the sale of the said property, and that judgment may be entered accordingly.

All of which is respectfully submitted.

Dated at Johnstown, N. Y., this day of , 189 .

FRED. L. CARROLL,
Referee.

Judgment on Report of Referee.

(See text, page 265.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House,
in the city of Johnstown, N. Y., on the
day of , 189 .

Present — Hon. M. L. Stover, Justice.

SUPREME COURT — FULTON COUNTY.

(Title of the cause.)

This action having been brought on for trial in this court to foreclose a mechanic's lien, and the issues therein having been referred to Fred. L. Carroll, Esq., an attorney-at-law of the city of Johnstown, county of Fulton, and State of New York, as referee, to hear and determine the same, by order duly made and entered in the Fulton County Clerk's office, on the day of , 189 , and the said referee duly made his report, which was dated on the day of , 189 , and which said report has been duly filed, and whereby said report he finds in favor of the plaintiff and against the defendant for the foreclosure of said lien, and that the plaintiff is entitled to recover of the defendant the sum of dollars, together with his costs and disbursements of this

action and that the said sum is a lien upon the premises described in the plaintiff's complaint, and that judgment be entered foreclosing said lien, and that said property be sold, and that all the right, title and interest which the defendant had in and to the said property at the time of the filing of the lien described in the complaint, and for the payment to the plaintiff from the proceeds of said sale the said sum of dollars, together with plaintiff's costs and disbursements of this action to be taxed, and in case the proceeds be insufficient to pay the same as aforesaid, then the plaintiff may have judgment against the defendant for the amount of such deficiency so remaining, and it appearing to the court that due notice of the confirmation of said referee's report has been given to all parties, now, on motion of H. W. Thorne, attorney for the plaintiff, no one appearing in opposition thereto, it is further

Ordered, that said report be and the same is hereby in all things confirmed, and it is further

Adjudged and decreed, that the right, title and interest which the defendant had in and to the premises described in the plaintiff's complaint and hereinafter more particularly described, be sold at public auction, at the front door of the court house, in the city of Johnstown, county of Fulton and State of New York, on the day of , 189 , by and under the direction of James D. Rogers, a counselor-at-law of the city of Johnstown, N. Y., who is hereby appointed referee for that purpose, and that the said referee give public notice to all the parties in this action, of the time and place of said sale according to law, and the practice of this court, and that either of the parties to this action may be purchasers at said sale, and that the said referee shall deliver to the purchaser or purchasers a deed or deeds of the said premises so sold, upon the purchaser or purchasers complying with the terms and conditions of said sale, and out of the proceeds

of said sale, after deducting his fees and expenses thereof, the said referee pay to the plaintiff or his attorney the sum of dollars costs, taxed as aforesaid, together with the interest thereon from the date hereof, and that he further pay to the plaintiff or his attorney the sum of dollars, the amount of the claim and interest, as reported due as aforesaid, with interest thereon from the date of the said report, or so much of the proceeds money as will pay the same, and take a receipt therefor and file the same with his report with the clerk of this court with all convenient speed, and that said referee pay the surplus arising from said sale, if any there should be, into court to the credit of this action, and that he make and report the said sale and file the report thereof with the clerk of the court with all convenient speed, and if any deficiency be remaining after said sale the referee shall specify the amount of such deficiency in his report, and that said plaintiff may recover of the defendant the amount of such deficiency so remaining, and that execution do issue therefor, and that the purchaser or purchasers be let into the possession of said premises on the production of the referee's deed; and it is further

Adjudged, That the said defendant and all persons claiming under him subsequent to the filing of the notice of the pendency of this action be forever barred and foreclosed of all right, title and interest, estate, claim, lien or equity of redemption of, in and to the said premises sold as aforesaid, and of every part thereof.

The following is a description of the said premises, to wit: (Description.)

Enter in Fulton county.

M. L. STOVER,

J. S. C.

(NOTE.—The entry of judgment upon this order, mode of sale, notice hereof, report of referee of sale, are the same as in a mortgage foreclosure. See pages 183 to 190, ante.)

CHAPTER VII.

SALE OF REAL ESTATE OF INFANTS AND INCOMPETENT PERSONS.

An incompetent person is one who has been adjudged insane, an idiot or habitual drunkard.

Action.

An action may be maintained against an infant or incompetent person to obtain judgment directing a conveyance of real property or an interest therein.

First. Where they are seized or possessed of real property by way of mortgage or in trust for another.

Second. Where a valid contract for the sale or conveyance of real property or interest therein, has been made by them or by any person through whom they acquired title or interest.

Code, § 2345; Hyatt v. Seeley, 11 N. Y. 52; Gregg v. Gregg, 48 Hun, 452; Kent v. Church of St. Michael, 136 N. Y. 10; Hughes v. Jones, 116 N. Y. 75.

By whom maintained.

The action may be maintained by any person entitled to the conveyance under subdivision 1 of the Code, section 2346.

Code, § 2346.

Under subdivision 2 the party, his executor or administrator, heirs or devisee, who made the contract, administrator or his heir or devisee who owned the property or was possessed of it, or any interest in it, or who died seized or possessed of it, may maintain action.

Code, § 2346, sub. 2.

The action may be maintained by the committee of a lunatic or incompetent person. Where the defendant is an infant the court must appoint a special guardian for the incompetent, and the proceedings are the same as in an action against an infant.

Code, § 2346.

Power of the court.

It is within the discretion of the court whether a conveyance shall be made.

Code, § 2347.

If the court directs conveyance to be made he has the power to direct the guardian or committee to execute the conveyance or do any act necessary to carry the judgment into effect.

Code, § 2347.

Proceedings to sell; when maintained.

The real property, or any interest therein, or any inchoate right of dower of an infant or incompetent person, may be sold, conveyed, mortgaged, released or leased.

First. When the personal property and the income of the real property are together insufficient for the payment of his debts or for the maintenance of himself and family.

Second. Where his interest require or will be substantially promoted by such disposition by reason of said real property or term or estate, or other real interest being exposed to waste, dilapidation or wholly unproductive, or for the purpose of raising funds to preserve or improve the same, or for any other peculiar reason or peculiar circumstance.

Third. Where an action might be maintained against them to procure a judgment as prescribed in sections 2345 and 2346.

Code, § 2348; *Jenkins v. Fahey*, 73 N. Y. 355; *Matter of Valentine*, 72 N. Y. 184; *Matter of Dodge*, 40 Hun, 443; *Pharis v. Gere*, 110 N. Y. 347; *Wood v. Mather*, 38 Barb. 473; *Bowman v. Tallman*, 27 How. Pr. 213; *Weinstock v. Levison*, 20 Civ. Pro. 1; *Matter of Dunn*, 64 Hun, 18; *Gerber v. Met. Ele. R. R. Co.*, 3 Misc. 427.

By whom the application is made.

The application must be made by the petition of either the general guardian of the infant or the committee of the incompetent, or by a relative or other person in behalf of either.

Code, § 2349.

Infants over fourteen must join.

If in behalf of an infant of the age of fourteen years or upward, the said infant must join in the petition.

Code, § 2349.

Where presented.

If the application is made to the Supreme Court, it must be presented at a term held within the judicial district in which the property or a part is situated.

Id.; In Matter of Bookhout, 21 Barb. 348; Cole v. Gourlay, 9 Hun, 493; Matter of Valentine, 72 N. Y. 184.

The application may also be made to the County Court of the county where the property is situate.

Code, § 340, sub. 4.

Petition.

The application must be by a petition signed by the guardian or committee and verified in like manner as a pleading.

Code, § 2350.

If the application is based upon the ground that the personal property and the income of the real property are not sufficient for the payment of his debts or his support, or where his interest will be promoted by a sale, then it must state the particulars and value of the real and personal property, and the amount of the income of such person, and the disposition that has been made of his personal property, and an account of the debts or demands, if any, existing against the estate.

Code, § 2350.

If the application is made upon the grounds that a conveyance may be compelled, then it must state the particulars and value of the real property of which the sale is desired.

Code, § 2350; Wood v. Mather, 38 Barb. 473; Matter of Valentine, 72 N. Y. 184.

Committee must be appointed.

Said application cannot be granted unless a committee has been appointed.

Code, § 2351.

For an incompetent.

If the application is made by the committee, the court must make an order directing him to file a bond with the clerk in such form, for such amount, and with such sureties, as it directs, conditioned for the faithful discharge of his trust, for the paying over, investing of, and accounting for all moneys he receives by virtue of such special proceedings, according to the direction of any court having authority, and for the observance of the directions of the court in relation thereto.

Code, § 2351.

To show cause.

If the application is made by any other person an order must be made requiring the committee to show cause why he should not file such bond. And if the court is of the opinion that the application should be granted, it may make an order requiring the committee to file such bond, or if the committee elects or fails to file such bond it may make an order appointing a special guardian with respect to the proceedings, who must thereupon file such a bond.

Code, § 2351.

Release dower of an incompetent.

Where the application is made to release an inchoate right of dower it must be made by the husband, and may be made before or after a committee is appointed. And the court may appoint the husband special guardian, and he must file the bond above described.

Code, § 2351; *Matter of Spelman v. Terry*, 74 N. Y. 448; *Flynn v. Lynch*, 23 Civ. Pro. 369; *Koch v. Le Frois*, 61 Hun, 205; *id.*, 40 N. Y. St. R. 563.

Dower of infant.

The above section applies to lunatics, idiots or habitual drunkards. When the application is made in behalf of an infant the court must appoint a suitable person to be special guardian with respect to the proceedings, who must file the bond as above described in paragraph 1, section 2351, with the clerk.

Code, § 2352.

Trust company guardian.

Any trust company authorized by law to be general guardian may be appointed such special guardian, and the bond may, in that case, be dispensed with.

Code, § 2352; *Battell v. Torrey*, 65 N. Y. 294; *Brown v. Snell*, 57 N. Y. 286; *Matter of Spelman v. Terry*, 74 N. Y. 448.

Reference.

Upon the presentation of the petition and the filing of the bond, the court must make an order appointing a referee to take, hear and report his opinion upon the application, and file the testimony.

Code, § 2354.

Filing of the report.

Upon filing of said report the court makes a final order confirming the referee's report directing that the property or an interest therein, or an inchoate right of dower (or as the case may be), be mortgaged, leased, sold, released or conveyed (as the referee reports), by the special guardian or committee.

Final order.

The final order must contain such directions as to time, manner of sale and condition, as the court thinks proper to insert.

Code, § 2355; *Matter of Valentine*, 72 N. Y. 184; *Bowman v. Tallman*, 27 How. Pr. 213; *Cole v. Gourlay*, 9 Hun, 493; *Gerber v. Met. Ele. R. R. Co.*, 3 Misc. 427.

Agreement before sale, etc.

Before the deed, lease, release or mortgage can be made, or the sale, mortgage, lease or release, the special guardian or committee must enter into an agreement with the party purchasing, taking the mortgage, release or lien, which said special guardian or committee must report to the court under oath.

Code, § 2356.

Confirmation.

If the court confirm said report an order must be made to that effect, and directing the special guardian or committee to execute the deed, mortgage, release or lease.

Code, § 2356.

Conveyances under order.

Where, in the case of the executing of a conveyance under order of the court to fulfill a contract (previously made), or because the property is held by way of a mortgage or in trust only. The guardian or committee executing such a conveyance must report the conveyance to the court (before delivery) under oath.

Code, § 2356; *Hardie v. Andrews*, 13 Civ. Pro. 417; *Battell v. Torrey*, 65 N. Y. 294; *O'Reilly v. King*, 28 How. Pr. 408.

When cannot be sold, etc.

These proceedings cannot be had contrary to the provision of a will by which the property is devised, or of a conveyance or other instrument by which it was transferred to the infant or incompetent person.

Code, § 2357.

Effect.

These proceedings are of the same force and effect as if the deed, mortgage, lease or release were executed by the party, if competent.

Code, § 2358.

Dispositions of proceeds.

The court must, by an order, direct the disposition of the proceeds of the sale, mortgage or lease.

Code, § 2361.

The court must require a report under oath of the disposition and investment thereof.

Code, § 2361.

Inchoate right of dower.

Where an inchoate right of dower is released, the court shall make an order directing that one-third of the amount realized be invested by the special guardian or paid into court to be held for the benefit of the husband during his life, and upon his death for the benefit of the wife during her life, or the court may direct it paid to the husband upon his giving a bond, with two sureties in double the amount to be repaid on the death of the husband, as the court directs.

Code, § 2361; *Brown v. Snell*, 57 N. Y. 286; *Matter of Price*, 67 N. Y. 231.

Consent in writing.

Where the property to be sold is subject absolutely or contingently to a right of dower or estate for life in the whole or part thereof (to be ascertained by the court after sale), then the person holding such estate may manifest in writing his or her consent, either to accept a gross sum to be ascertained, or to have such interest invested, and the interest thereon paid to him or her.

Code, § 2362.

Upon the filing of said consent, then the court may direct the sale as above, ordering the sum to be paid or invested, upon the party executing an efficient release.

Code, § 2362.

Final order to authorize guardian to join.

When the interest of the infant or incompetent person consists of a right of dower or an estate for life or gross, the final order may authorize the special guardian or committee to join with the other parties holding the estate in a conveyance of the property, so as to release the right of dower or estate on receiving a gross sum in satisfaction of said interest or a proportionate part of the proceeds, to be invested. That interest is ascertained by the court.

Code, § 2363.

Investment.

Where the sum is received for investment, the final order must provide for the investment thereof until the determination of the particular estate, then for the payment thereof to the person entitled thereto.

Code, § 2363.

When the property is sold, mortgaged or leased, to raise money to pay debts, the guardian or committee must pay all debts in equal proportion, without any preference, whether founded on a specialty or a judgment.

Code, § 2364; Matter of Application of Otis et al., 101 N. Y. 583.

PRECEDENTS.

Petition.

(See text, pages 288, 289.)

COUNTY COURT.

In the Matter of the Application of the Committee of _____, a Lunatic, to Sell Real Estate.
--

To the County Court of the County of _____, State of
New York:

The petition of _____, the committee of the person
and estate of _____, a lunatic, respectfully shows:

First. That on the _____ day of _____, 189____, your
petitioner was duly appointed committee of the person
and estate of _____, a lunatic, by an order of the
Supreme Court, which said order was filed and entered in
the County Clerk's office of the county of _____, on
the _____ day of _____, 189____, and a commission duly
issued to your petitioner as such committee.

Second. That as such committee he has duly made out
an inventory of the estate of the said _____, real and
personal, and has therein stated the value thereof, and the
amount of the rents and profits of all of her real estate,
and the debts owing by said lunatic, a copy of which is
hereto annexed.

Third. Your petitioner further shows to the court that
the said _____, a lunatic, as is shown by the inven-
tory, has a one-ninth interest in the real estate as set forth
in the inventory hereto annexed; that said real estate con-

sists of a house and lot situate in _____,
 county, New York, and also a wood lot situated in the
 town of _____, _____ county, New York, consisting
 of about forty acres, and that the value of said house and
 lot and said wood lot is about \$ _____, and that the
 rental value of the same as now situate, is nothing.

Fourth. That the value of the personal estate of said
 _____, a lunatic, is about \$ _____, consisting sim-
 ply of household furniture, and that there are no debts or
 demands existing now against the estate of said _____,
 a lunatic (or there are debts amounting to \$ _____).

Fifth. That the said real property hereinbefore men-
 tioned belongs to (names of all parties who have any
 interest, and the amount of such interest), who hold said
 property as tenants in common, and who are desirous of
 selling and disposing of the same, and are threatening to
 bring an action in partition for the sale of the same, and
 have or are about to negotiate a sale of said property, and
 could sell the same providing the interest of the said
 _____ could be disposed of.

Sixth. That said property is exposed to waste and
 dilapidation, and is going to ruin, and is wholly unpro-
 ductive, and there is no revenue received or that can be
 derived from said property; and your petitioner verily
 believes that it will be for the best interest of the said
 _____, a lunatic, that said property be disposed of.

Wherefore, your petitioner prays for an order of this
 court that he may be authorized to sell the said interest
 of the said _____, a lunatic, in said real estate, and
 for that purpose that he may be empowered to join in a
 deed with the other of the said co-tenants herein named,
 for the purpose of selling and disposing of said real estate.

(Jurat.)

(Attach copy of the inventory.)

.....

Order to File Bond.

(See text, page 290.)

COUNTY COURT —

COUNTY.

At an adjourned term of the County Court, held at
the chambers of _____, in the city of
_____, N. Y., on the _____ day of _____,
189 .

Present — _____, County Judge.

In the Matter of the Application of the Committee of _____, a Lunatic, to Sell Real Estate.

Whereas, _____ was heretofore on the _____ day
of _____, 189 , by an order of _____, Justice of the
Supreme Court, duly appointed the committee of the per-
son and estate of _____, a lunatic; and

Whereas, the said _____, as such committee, has
made application for leave to sell and dispose of all the
right, title and interest of the said _____ in certain
real estate of which he is possessed; it is hereby

Ordered, That the said _____ is hereby directed to
file with the clerk of _____ county, a bond in the
amount of \$ _____, with two sureties, conditioned for
the faithful discharge of his trust, and for the paying over
and investing of and accounting for all moneys received
by him upon such sale, and to obey all directions of any
court having authority to give directions in the premises
in relation to said trust.

.....
County Judge.

Bond of Committee.

(See text, page 290.)

COUNTY COURT —

COUNTY.

In the Matter of the Application of the Committee of _____, a Lunatic, to Sell Real Estate.
--

Know all men by these presents:

That we, _____, of _____, _____ county, New York, principal, and _____, of _____, _____ county, New York, and _____, of _____, _____ county, New York, sureties, are held and firmly bound unto _____, a lunatic, of _____, _____ county, New York (now an inmate of the _____ Hospital for the Insane at _____, New York), in the sum of \$ _____, lawful money of the United States, to be paid to the said _____, his executors, administrators and assigns, to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the _____ day of _____, one thousand eight hundred and _____.

Whereas, by an order of _____, County Judge of _____ county, State of New York, made on the _____ day of _____, 189 _____, the above-bounden _____, as committee of the person and property of the above-named _____, a lunatic, has made application to this court for an order to sell certain interests in real estate of which the said _____ is possessed.

Now, therefore, the condition of this obligation is such that if the above-bounden _____ shall in all things faithfully discharge his duties upon such application, and shall pay over and invest and account for all moneys received by him in said special proceeding, and shall obey

Order of Reference.

(See text, page 291.)

COUNTY COURT —

COUNTY.

At a term of the County Court, held at the chambers of _____, in the city of _____, N. Y., on the _____ day of _____, 189 .

Present — Hon. _____, County Judge.

In the Matter of the Application of the Committee of _____, a Lunatic, to Sell Real Estate.
--

The petition of _____, the committee of the person and estate of _____, a lunatic, having been duly presented and filed in the above-entitled proceedings on the _____ day of _____, 189 , asking for leave to sell and dispose of the right, title and interest of the said _____ in certain real estate of which he is possessed, and the said committee having heretofore filed a bond in the Supreme Court for the faithful discharge of his duties as such committee.

Now, upon application of _____, Esq., attorney for said petitioner, it is hereby

Ordered, That _____, of _____, New York, counselor-at-law, be and he is hereby appointed as referee to inquire into the merits of said application, and that said referee examine into the truth of the allegations of the said petition, hear the allegations and proofs of all persons interested in the application, and report his opinion thereupon, together with the testimony, with all convenient speed.

.....

County Judge of

County.

Appointing a Hearing.

(See text, page 291.)

COUNTY COURT —

COUNTY.

In the Matter of the Application of the Committee of _____, a Lunatic, to Sell Real Estate.
--

The above-entitled matter having been referred to me to inquire into the merits of the application, and to examine the truth of the allegations of the petition and all persons interested in the property, and to report my opinion thereupon, together with the testimony, with all convenient speed.

I, the undersigned referee, do hereby appoint the day of _____, 189____, at _____ o'clock _____ noon, at the office of _____, in the city of _____, as the day and hour for hearing the proofs in the above-entitled matter.

.....

Referee.

—————

Notice of Hearing.

(Same title.)

To

Take notice you are hereby notified to be and appear before _____, Esq., referee, on the _____ day of _____, 189____, at _____ o'clock of said day, at the office of _____, No. _____ street, city of _____, N. Y., in the above-entitled proceeding.

.....

Referee.

.....

Attorney for Petitioner,
Office and post-office address,

Referee's Report.

(See text, page 291.)

COUNTY COURT.

In the Matter of the Application for
the Sale of the Real Property of
, a Lunatic.

I, _____, the referee appointed in the above-entitled proceedings, by an order of the court therein, dated the _____ day of _____, 189____, do hereby make and render this, my report, thereon:

First. That having taken the oath as required by law, which oath is hereunto annexed, and having been attended by _____, attorney for the petitioner, I have examined into the truth of the allegations of the petition herein, and have heard the proofs and allegations of all persons interested in the property, or otherwise interested in the application.

Second. I do report that in my opinion a sale (or lease or mortgage) of the premises described in the said petition would be beneficial to the interests of the said _____ for the following reasons: (State any facts that are required and necessary under the Code, to warrant the sale, or lease, or mortgage.)

Third. I do further report that the said premises are worth the sum of \$ _____, and are in the following condition, to wit (state the condition and where situated), and that the rental value and use of said premises amounts to \$ _____ per annum, and that the value of the interest of said _____ therein amounts to \$ _____.

Fourth. I do further report that it will be for the best interests of the said _____ to have the said real estate sold (or leased or mortgaged). (If there is a dower right in said property state who is entitled thereto, and the amount and value of said right.)

I have annexed hereto the testimony taken by me upon said hearing.

All of which is respectfully submitted.

Dated this day of , 189 .

.....

Referee.

Order Confirming Referee's Report and Ordering Sale.

(See text, page 291.)

IN COUNTY COURT.

At a term of the County Court, held in the chambers of , County Judge, at , N. Y., on the day of , 189 .

Present — Hon. , County Judge.

In the Matter of the Application of the Committee of , a Lunatic, to Sell Real Estate.
--

Upon filing the report of , referee, appointed herein by order of this court, which report is dated the day of , 189 , from which it appears satisfactory to this court that the interest of the said , a lunatic, will be promoted by a sale of her share and interest in the real estate mentioned in the petition in this matter, and for the reason stated in said report.

Now, on motion of , Esq., counsel for said petitioner, it is

Ordered, That said report be and the same is hereby confirmed. It is further

Ordered, That , the committee of said , a lunatic, be and he is hereby authorized and empowered and directed to sell for cash, all the right, title and interest of the said in and to said real estate, at a

price not less than the sum specified by said referee in his report, as the value thereof. It is further

Ordered, That the said referee give notice of said sale by posting three notices thereof in conspicuous places, and that said land be sold; and that said sale be held at public auction between the hours of _____, not less than ten days from the date of the posting of said notices. And it is hereby further

Ordered, That before such sale be made pursuant hereto, the said _____, committee, enter into an agreement therefor, subject to the approval of this court, and report the said agreement and his proceedings thereon, to this court, under oath.

.....

County Judge of

County.

—————
Notice of Sale.

PUBLIC SALE.

Pursuant to an order of the Hon. _____, County Judge of _____ county, N. Y., notice is hereby given that I, the undersigned, _____, committee of the person and estate of _____, a lunatic, will sell on the _____ day of _____, 189____, between the hours of _____, at _____, in the city of _____, _____ county, N. Y., all the right, title and interest of the said _____ in and to that piece or parcel of land situate in the town of _____, and known and distinguished as _____, containing about _____ acres of land; also all that other piece or parcel of land described as follows, _____, containing about _____ acres of land.

Each piece of land will be sold separately to the highest bidder.

Terms of sale.

.....

Committee.

(See text, page 291.)

That whereas, on the day of , 189 , at a public sale of all the right, title and interest of , a lunatic, in and to all of his real estate situate in the town of , N. Y., one , of , N. Y., was the highest and best bidder therefor.

In witness whereof, we have hereunto set our hands
this day of , 189 .

Committee of

• • • • •

Report of Sale.

(See text, page 291.)

COUNTY COURT.

In the Matter of the Sale of the Real
Estate of _____, a Lunatic.

To the County Court of County, N. Y.:

In pursuance of an order of this court made in the above-entitled matter on the day of , 189 , authorizing and empowering and directing me, as the committee of , therein named, to contract for the sale and conveyance of all the right, title and interest of the said lunatic in and to the real estate mentioned and described in the petition in this matter, dated the day of , 189 , and to report upon oath the terms and conditions of the agreement made by me with the purchaser or purchasers before the execution of any deed or instrument of conveyance of the said premises.

Now, I, _____, the said committee, do certify and report that I have entered into an agreement subject to the approbation of this court, with _____, of _____, N. Y., for the sale of all the right, title and interest of the said _____, a lunatic, in and to the following described real estate, to wit: (Description), upon the following terms and conditions, viz.: The said _____ to pay therefor the sum of \$ _____ cash, of which sum the said lunatic is entitled to a _____ part thereof, amounting to \$ _____.

I do further report that the costs and expenses of these proceedings amount to \$; after deducting said sums from portion of the purchase money belonging to said lunatic there will remain the sum of \$ due to said lunatic, which will come into my hands as such committee.

And I do further report that I held said sale at public auction after giving due notice thereof, and that the said

property was sold to said and ,
 they being the highest bidders therefor for each separate
 parcel sold; and that being the best sum and sums for
 which the same could be sold; and that the said price
 obtained therefor is, in my opinion, the full value of said
 described property.

All of which is respectfully submitted.

Dated , 189 .

.....

Committee.

(Jurat.)

Order Confirming Report.

(See text, page 291.)

COUNTY COURT — FULTON COUNTY.

At a term of the County Court, held in the cham-
 bers of , County Judge, at ,
 N. Y., on the day of , 189 .

Present — Hon. , County judge.

In the Matter of the Sale of the Real Estate of , a Lunatic.
--

On reading and filing the report of , the com-
 mittee of the lunatic above named, made in pursuance of
 the order of this court, dated the day of ,
 stating that in pursuance of said order he had sold said
 real estate at public sale, and had entered into an agree-
 ment subject to the approbation of this court, with
 and , for the sale of all the right, title and inter-
 est of the said , a lunatic, in and to the real
 estate mentioned in said order, upon the terms and con-
 ditions specified in the said report.

Now, on motion of , Esq., counsel for the
 said petitioner, it is

Ordered, That the said report and the agreement therein named, be and the same are hereby ratified and confirmed. And it is further

Ordered, That the said _____, the committee of the said _____, a lunatic, do execute, acknowledge and deliver to the said _____, a good and sufficient conveyance of all the estate, right, title and interest of the said _____, a lunatic, in and to the premises described as follows: (Description), upon his compliance with the terms and conditions upon which by the said agreement the deed was to be delivered. And it is further

Ordered, That so much of the proceeds of said sale as shall be necessary, be applied to the payment of the expenses of said sale, together with the costs of these proceedings, to wit: The sum of \$ _____, and of the remainder of such proceeds so much as may be immediately necessary, be applied to the maintenance and education of the said lunatic; and that the residue thereof be kept for the benefit of the said lunatic, and that the said _____ do make a return to the court, in writing and upon oath, of the investment and disposition of the proceeds as soon as may be.

.....

County Judge of _____ County.

Report of Conveyance and Disposition of Funds.

(See text, page 293.)

COUNTY COURT.

In the Matter of the Application of the Committee of _____, a Lunatic, to Sell Real Estate.
--

To the County Court of _____ County:

I, _____, committee of the above-named _____, having been directed by an order of this court dated the

day of , 189 , to execute, acknowledge and deliver in the name of the said , a lunatic, to and , of , N. Y., conveyances of all the interest of said lunatic in the real estate mentioned and described in the petition in these proceedings, for the sum of \$, do hereby certify and report that I have executed such conveyances as in and by said order I was directed, such purchasers having complied with the terms and conditions of said sale, and I have received from such purchasers on account of the proceeds mentioned, the sum of \$, of which said sum the interest of the said , a lunatic herein, amounted to \$.

That out of said sum last mentioned I have paid to , Esq., attorney for the petitioners, the sum of \$ for the costs and expenses of these proceedings, including referee's fees, and that I have taken from said attorney his receipt for such costs and expenses, which is hereto annexed; and that the costs and expenses of executing said conveyances herein is the sum of \$, and that there are no moneys left in my hands as the proceeds of said sale, belonging to said lunatic (or that there is left in my hands \$ which I hold as committeeman for the benefit of).

All of which is respectfully submitted.

Dated the day of , 189 .

.....

Committee.

(Jurat.)

Order on Final Report.

(See text, page 293.)

COUNTY COURT —

COUNTY.

At a term of the County Court held in the chambers of the Hon. _____, County Judge, at _____, N. Y., on the _____ day of _____, 189 .

Present — Hon. _____, County Judge.

In the Matter of the Sale of the Real Estate of _____, a Lunatic.
--

On reading and filing the final report of _____, committee of _____, a lunatic, of the execution and delivery of a deed of all the interest of said lunatic heretofore sold by him, bearing date _____, 189 .

Now, on motion of _____, Esq., attorney for said petitioner,

Ordered, That the said report be and the same is hereby in all things ratified and confirmed, and that said committee be discharged from further duties and obligations pertaining thereto.

.....

County Judge of _____ County.

CHAPTER VIII.

SALE OF DECEDENT'S REAL PROPERTY TO PAY HIS DEBTS.

These proceedings are instituted in the Surrogate's Court, and are commenced by the presentation and filing of a petition.

Code, § 2750.

Special proceeding.

It is a special proceeding as distinguished from an action.

Skidmore v. Romain, 2 Braf. 122.

But it is not a proceeding in rem within the rule which would make the adjudication therein conclusive upon all the world.

Schneider v. McFarland, 2 N. Y. 459.

Nor is a suit against the heirs and devisees within the meaning of sections 1843 and 1844, Code of Civil Procedure.

Statutory proceedings.

The proceedings being statutory, every direction of the statute must be strictly complied with.

Vandeusen v. Sweet, 51 N. Y. 378; Stillwell v. Swarthout, 81 N. Y. 109.

Title.

Title to real estate upon the death of the owner reverts immediately to his heirs and devisees.

Kingsland v. Murray, 133 N. Y. 170.

Taken to pay debts.

Therefore, it can be taken for the payment of the decedent's debts only by virtue of the statute, and the statutory provisions must be strictly pursued.

Id.

No personal property.

To justify a decree for the sale of his real estate to pay debts, it must appear that all the personal property of the decedent which could have been applied to the payment

of the debts and funeral expenses, has been so applied, or that the administrator has proceeded with reasonable diligence in converting the same into money, and so applying it, and that it was insufficient to pay the same.

Id.

Application to what court.

The application must be made to the Surrogate's Court from which letters issued. And the Supreme Court has no jurisdiction.

Code, § 2750; *Hoey v. Kinney*, 10 Abb. Pr. 400.

Extent of jurisdiction.

The Surrogate's Court, which had jurisdiction to issue letters, has the power to decree the disposition of property anywhere it may be, in the State.

Lang v. Olmstead, 3 Dem. 581.

Property liable.

All property of which decedent died seized or in which he had any interest.

Code, § 2749.

Exception.

All property devised expressly charged with the payment of his debts.

All property expressly exempted by sections 1395 to 1404.

Property liable, and the order in which it must be sold is:

First. All property absolutely owned by decedent.

Second. All property in which he held an interest.

Third. All property specifically devised and not sold by the devisees.

Fourth. All property specifically devised and sold by the devisees.

Code, § 2763.

How begun.

The proceedings are commenced by petition of either an executor, administrator, a judgment creditor or any other creditor, except one secured by a mortgage upon decedent's real property.

Code, § 2750.

What the petition is to contain.

The petition must contain:

First. A statement of the unpaid debts, and the name of each creditor or claiming to be a creditor, and also the amount of unpaid funeral expenses, and to whom due.

Second. A general description of the land belonging to decedent, or in which he had an interest, situate within the State, with the value of each parcel, its condition, and whether occupied or not; if so, who occupies it. If only an interest what is its value.

Matter of Bingham, 127 N. Y. 296.

Third. The names of the husband or wife, and of all heirs and devisees, and all persons claiming under them. If any are infants, state who and their age, and if they have a general guardian, his name. And if the petition is presented by a creditor give name of executors or administrator.

Fourth. If the petition is presented by the executor or administrator, then it must show the amount of personal property, the application of it, and how much may yet be realized. (It is better to have a final accounting or file an account showing these matters.)

Code, § 2752; *Richmond v. Foote*, 3 Lans. 244.

The petition must be duly verified.

Code, § 842.

Where matters are unknown.

If any of the matters required to be set forth cannot be ascertained after diligent inquiry, the Surrogate must proceed as in section 2518, Code.

Code, § 2753.

Citation.

Upon proper showing and inquiry as provided, the court must issue a citation directed to all creditors who have presented claims, and all heirs, devisees, next of kin, whether named in the petition or not, having any lien upon the property to be sold.

Code, § 2754.

If there has been no notice published to creditors to present claims, then the citation must be to all creditors.

Code, § 2754; Corbett v. Fernschild, 34 Hun, 501; Kammerer v. Zrigler, 1 Dem. 177.

On return of citation.

Matters necessary to be shown on the return of the citation. The party presenting the petition must present proof to the court of the condition of the personal estate and the amount that has come into the hands of the executor or administrator and the disposition of the same, the amount of the claims and funeral expenses, the condition, situation and value of the real estate, and title and interest of decedent, who are the creditors, heirs, devisees and next of kin.

Also proof as to whether the real estate can be sold in parcels or as a whole, what, if any, is devised, and that none is devised charged with the payment of the debts, and, also, all mortgages or other liens against the property.

Code, § 2755.

Contents of the decree.

What the decree must determine and contain.

It must determine and state the amount of each debt proven and allowed.

It must determine and state the charges for funeral expenses allowed.

It must determine and state the amount of each judgment lien.

It must determine and state the amount due and unpaid upon any mortgage.

Code, § 2758.

Decree of sale.

The decree of sale can be made only upon the following facts:

First. That all matters and things have been done as stated herein.

Code, §§ 2750, 2752, 2753, 2754, 2755, 2758, 2759.

Second. That the debts or liens, or both, are the debts

of the decedent, or are just and reasonable charges for funeral expenses or liens by judgment existing at the time of his death upon the real property or some portion thereof. And that such debts, charges or liens are justly due.

Code, § 2759.

Third. That said debts and charges are not secured by judgment or mortgage or expressly charged upon the real property, or if charged or secured, that the creditor has exhausted his remedies.

Code, § 2759.

Fourth. That the property to be sold was not devised and charged with the payment of the debts, or if so devised, that it is unpracticable to enforce the charge and that the creditor has relinquished the same.

Code, § 2759.

Fifth. That all of decedent's personal property which could be applied to the payment of said debts has been so applied, or that it is being converted into money and being applied, but is insufficient to pay the same.

Code, § 2759.

Conclusiveness of the decree.

When the Surrogate takes evidence upon the hearing his decision and order giving leave to sell are conclusive.

Graham v. Linden, 50 N. Y. 547.

Commissioners appointed.

When the debts and condition of the property are satisfactorily established, the Surrogate must appoint three persons to examine and appraise the real property and its rental value, and report the same under oath, describing each parcel, stating its value and rental value, which report must be filed in the Surrogate's office.

Code, § 2760.

Decree to mortgage or lease.

If, on such appraisal, it appears that sufficient moneys can be raised by mortgage or lease, then a decree must be made to that effect.

Code, § 2760.

Length of lease.

Where a decree directs a lease of the property it shall not be for a longer time than till the youngest person interested attains his majority.

Code, § 2760.

Decree to sell.

If, upon the report of the commissioners, it is ascertained that sufficient moneys cannot be raised by lease or mortgage, the decree must direct a public or private sale of the property or interest therein, in part or whole, sufficient to pay the debts and claims established by the decree.

Code, § 2761.

Sale subject to liens.

The decree may provide, if it is for the best interest of all persons concerned, that the sale be made subject to all judgment liens that existed at decedent's death which have been established by the decree.

Code, § 2761; Matter of Dolan, Ext., 88 N. Y. 309.

Where title is in controversy.

If it appears that the title of any of the real estate is in controversy, the decree may direct that the sale of that portion be postponed until further directions.

Code, § 2762.

Order to sell such portion.

And any person interested may at any time, upon notice, apply for an order to sell such portion.

Code, § 2762.

Order in which lands devised should be sold.

If it appears that one or more parcels of which decedent died seized has been devised by him or sold by his heirs, the decree should direct the lands to be sold in the following order:

First. Property which descended to the heirs and not sold by them.

Second. Property so descended which has been sold by them.

Third. Property which has been devised and has not been sold by the devisee.

Fourth. Property so devised that has been sold by the devisee.

Code, § 2763.

Where the entire property must be sold.

Where the decedent's will devises an undivided interest, but not the whole of his estate, or creates a precedent estate, or where an heir has sold an undivided interest, or created a precedent estate, the entire property must be sold.

Code, § 2764.

Form of decree.

The decree must describe the property or interest to be sold with common certainty, and direct that a mortgage, lease or sale thereof be made by the executor or administrator upon his giving a bond and filing the same with two or more sureties, to the People of the State, in a penalty of at not less than twice the sum to be raised if mortgaged, or in such a sum as the Surrogate fixes, if it is to be leased, or in a sum not less than twice the value of the real estate, if it is to be sold, conditioned for the faithful performance of the decree, and the paying over to the court within twenty days after the receipt thereof of all moneys and securities.

Code, §§ 2765 and 2766.

It must also state what debts, judgment liens and funeral expenses have been established for which the land is mortgaged, leased or sold.

Code, § 2765.

Appointment of a freeholder.

If the executor or administrator fails to execute the bond directed within a reasonable time, the Surrogate must make an order directing a disinterested freeholder to execute the decree.

Code, § 2767.

Order to execute the decree.

Upon the filing of the bond as above prescribed, the Surrogate must make an order stating that fact and directing him to proceed to execute the decree.

Code, § 2768.

Sale as to part or whole.

The order may direct the execution as to the whole or a part of the premises, or any interest therein.

Code, § 2768.

Where the order directs as to a part only, an order to execute it as to any other part or parts may be made from time to time as the case requires.

Code, § 2768.

This section does not authorize a sale of any distinct parcel in any different order than prescribed in sections 2763 and 2764.

Sale on credit.

The Surrogate may, in the decree or by a separate order, allow the sale to be made on credit not to exceed three years, and for not more than three-fourths of the purchaser's money.

Code, § 2771.

Sale notice.

Each distinct parcel must be sold in the county where it or a part thereof is situate.

Code, § 2772.

The notice of the sale and the manner of conducting the same, are the same as sale under an execution.

Code, §§ 1384, 1385, 1386, 1434, 1435, 1436.

Private sale.

A private sale or an interest therein must be made by contract in writing, subject to the approval of the Surrogate.

Code, § 2772.

Each parcel sold separately.

If the property to be sold consists of one or more distinct parcels, each parcel must be sold separately unless otherwise ordered.

Code, § 2773.

Report of sale.

The person making the sale must immediately make and file with the Surrogate a report of the sale, setting forth the manner of the sale, to whom, and for how much each parcel was sold.

Code, § 2775.

Vacating the sale.

The Surrogate, upon such notice as he thinks proper to all persons interested, must inquire into the report, and he may vacate the sale if he believes it to be unfair or that the property would sell for ten per cent more, including costs of resale, and order a resale.

Code, § 2775.

Confirming the sale.

If the Surrogate finds that the sale is in all things just and correct, he must make an order confirming the same, and direct the person who made the sale to execute the proper conveyance.

Code, § 2776.

Conveyance.

The necessary conveyance must be executed by the person who made the sale, and must briefly refer to the decree, the order to execute it, and the order of confirmation.

Code, § 2776.

Surrogate cannot compel specific performance.

The Surrogate cannot compel the purchaser to take the conveyance and pay the money, because he is not a party to the proceedings.

Cromwell v. Phipps, 6 Dem. 61; Matter of Bellsheim, 1 N. Y. Supp. 276.

Money refunded.

But the Surrogate can compel a refunding of the money paid upon a showing that there is a defect in the title.

Code, § 247, subd. 5, and § 2481, subd. 11; Matter of Lynch, 33 Hun, 309; Matter of Dolan, 88 N. Y. 309.

Title of purchaser.

The title of a purchaser or mortgagee in good faith and for value from an heir or devisee, is not affected by the sale and conveyance of the property unless letters testa-

mentary or of administration upon the estate of the decedent have been granted upon a petition presented to the Surrogate's Court within four years after the death of decedent.

Code, § 2777; *Parkinson v. Jacobson*, 18 Hun, 353.

Conveyances in other cases.

Except as above, the purchaser at the sale takes all the estate, right and interest of the decedent at the time of his death, free from any claim for dower not assigned, but subject to all liens existing at the time of the death of decedent, unless said liens are decreed to be paid out of the proceeds of the sale, as provided by sections 2791 and 2793.

Code, § 2778.

Widow's dower assigned.

But where the widow's dower is assigned the grantee takes such part to which her dower is assigned, subject to it.

Code, § 2778; *Estate of David Haight*, 14 Civ. Pro. 359.

Infants.

All infants must appear by guardian.

Code, § 2785.

Proceeds.

The proceeds must be paid into court. And for that purpose the court must make an order directing the same to be paid to the County Treasurer, a certified copy of which must be filed with said treasurer at the time of making the payment.

Code, § 2786; General Rule of Practice, No. 68.

Notice of distribution.

Immediately after the payment of the money into court the Surrogate must cause notice of the time and place of making the distribution to be published for at least six weeks in a newspaper published in the county of the Surrogate.

Code, § 2787.

Hearing upon the notice.

At the time and place specified the Surrogate must hear the allegation and proofs of the creditors, and of all

persons interested, respecting any demands which had not before been established or rejected before making the decree.

Code, § 2788; Estate of Wilcox, 11 Civ. Pro. R. 115.

The provisions of sections 2755 and 2756, relating to contesting and establishing debts, apply to any demand so presented.

Code, § 2788.

The unsold property directed to be sold.

If it should appear that the proceeds of the property sold are insufficient to satisfy the costs, expenses and claims so proven, then the Surrogate must make an order as prescribed in section 2768, directing the execution of the decree as to the remainder of the property, or so much thereof as is necessary.

Code, § 2789.

Decree to pay.

The Surrogate must make a decree fixing the sums to be paid and to whom, a certified copy of which must be served on the County Treasurer.

Code, § 2792.

Effect of an action to foreclose, etc.

The proceedings taken under this title are not affected by any action or proceeding to sell the same property, except the Surrogate may, and in a proper case must stay the order to execute the decree as to a mortgage, lease or sale, until the determination of the action pending, or the further order of the Surrogate with respect thereto.

Code, § 2797; Matter of Stillwell, 68 Hun, 406;

If the Surrogate should order the sale to be made afterwards, the directions relating to the property sold relates to the proceeds.

Code, § 2797; Stillwell v. Swarthout, 81 N. Y. 109.

Appeals.

An appeal to the Appellate Division of the Supreme Court lies from every decree of a Surrogate's Court, and every order effecting a substantial right made before or

after a decree in a special proceeding by the Surrogate or by the Surrogate's Court.

Code, §§ 2550-2570.

What is reviewed.

The appeal brings up for review each intermediate order which is specified in the notice of appeal and necessarily affected by the decree, and which has not already been reviewed by the Appellate Court on that order.

Code, § 2571.

The notice, what to contain.

The notice must specify what is desired to be reviewed by the Appellate Court.

Code, § 2571.

Time to appeal.

The appeal must be taken within thirty days after service of a notice of entry, by a party who has appeared, and within three months after entry of the decree, by a party who has not appeared.

Code, § 2572.

Parties to the appeal.

Each party to the special proceedings and each person who has or claims to have an interest or right in the subject matter which is directly affected, must be made parties on the appeal.

Code, § 2573.

Appeal from an order for a new jury trial.

An appeal may be taken from an order made upon a new jury trial.

Code, § 2549.

Appeal from the decree.

An appeal may be taken from the order establishing the validity of a debt.

Code, § 2796.

Supplementary decree.

An appeal may be taken from either of the supplementary decrees by any person aggrieved thereby as from the

first decree, except it is not necessary or proper to make any creditor a party.

Code, § 2791; Higbie v. Westlake, 14 N. Y. 281.

Appeal as to the validity or amount of a debt.

Upon an appeal where the only question that is raised is as to the validity or amount of a debt or judgment lien, and the property directed to be sold is in distinct parcels, the sale of any one or more of which will suffice to pay all the other debts and liens leaving enough unsold to satisfy the claim in question, the Appellate Court, upon motion and notice to all parties to the appeal may direct the Surrogate's Court to cause the decree to be executed to that part only which is necessary to satisfy those claims about which there is no question.

Code, § 2769.

Costs and expenses.

The person disposing of the property is allowed all expenses and a reasonable sum for his own services not exceeding five dollars for each day actually and necessarily occupied by him in disposing of the property, and a further sum for the necessary services of counsel.

Code, § 2563.

Costs.

Costs are in the discretion of the court.

Matter of Matthews, 27 Hun, 254.

No commissions.

The allowances are in lieu of commissions.

Code, § 2564.

No costs allowed a creditor.

A creditor cannot be allowed costs unless he should be the petitioner.

Lang v. Olmstead, 3 Dem. 581; Cook v. Woodward, 5 Dem. 97.

Fees of appraisers.

In addition to his actual expenses an appraiser is entitled to five dollars per day actually and necessarily expended, proven by his affidavit.

Code, § 2565.

Fees of referees and witness.

The fees of referees and witness are the same as in the Supreme Court.

Code, § 2566.

Surrogate's fees.

The Surrogate is entitled to charge and receive ten cents a mile going to and returning from a place other than his office, to take testimony, and ten cents a folio for a copy of any paper.

Code, § 2567.

Costs of appeal.

Costs of appeal may be awarded by the Appellate Court as if from an order of the Surrogate's Court.

Code, § 2549.

Trial by referee or jury.

In these proceedings questions arising over a disputed claim, insufficiency of assets, validity of liens, etc., the court may refer the questions to a referee or make an order directing a trial by a jury at a Circuit Court held within the county or in the County Court of the county.

What the order should state.

The order must state distinctly and plainly each question of fact to be tried, and it is the only authority necessary for the trial.

Code, § 2547.

Discretionary.

The power to direct a jury trial is discretionary.

Mead v. Jenkins, 4 Redf. 359.

Review.

The trial by a jury can only be reviewed upon a motion for a new trial made before the Surrogate to whom the verdict of the jury is certified by the clerk of the court.

Code, § 2548.

Dower, amount of.

The widow's dower is one-third the gross amount, and not the amount less the charges and expenses of the sale.

Higbie v. Westlake, 14 N. Y. 281.

PRECEDENTS.

Petition.

(See text, page 312.)

To the Surrogate's Court of the County of Fulton:

The petition of respectfully shows:

First. That your petitioner is the sole administratrix of the estate of , late of the town of , county of , N. Y., deceased.

Second. That said died on the day of , 189 , intestate or (leaving a will which was duly admitted to probate by an order duly made by the Surrogate's Court of this county on the day of , 1895); that your petitioner was duly appointed administratrix of the estate of said , deceased, by an order duly made by the Surrogate's Court of this county on the day of , 1895.

Third. That thereupon your petitioner duly qualified and by order of the said Surrogate's Court duly made on the day of , 189 , letters of administration were duly issued to your petitioner, who thereupon entered upon the discharge of her duties as such administratrix, which letters still remain in force.

Fourth. That an inventory of the personal property was duly made and filed in the Surrogate's office of the county of , by said , as administratrix, etc., on or about the day of , 1895, and that the personal estate of said decedent has been discovered to be insufficient for the payment of the debts and funeral expenses of said decedent.

Fifth. That on the day of , 1895, pursuant to an order theretofore made by the said Surrogate, your petitioner commenced the publication of notice to creditors of said , deceased, to present their claims, and continued said publication agreeable to the statute, for the period of six months.

Sixth. That the amount of personal property of said decedent which has come into the hands of your petitioner as such administratrix, is \$; that your petitioner has expended of the said amount in the due course of administration of said estate, the sum of \$, leaving in the hands of your petitioner as such administratrix on this day of , 1896, the sum of \$, and the amount of the personal property now in the hands of your petitioner undisposed of will not exceed in value \$.

Seventh. That the unpaid debts outstanding against the said , deceased, and the particulars thereof, with the name of each creditor or person claiming to be a creditor as far as the same can be ascertained by your petitioner, and the amount of the unpaid funeral expenses of the said decedent, and the name of each person to whom any sum is due by reason thereof, appear in the schedule hereto annexed marked schedule "A." That all of the debts against the said decedent not secured by mortgage or otherwise a lien or charge upon the real property of the said decedent, and which now remains to be paid, so far as the same can be ascertained by your petitioner, and as having been admitted by her upon due evidence, amount to \$, exclusive of interest, and that the claims against the said decedent which have been presented to your petitioner as such administratrix, but which have not been admitted or allowed by her for the reason that the sums named therein or any part thereof, are not due to the parties presenting the claim, amount to \$.

Eighth. That the following described real property is, as your petitioner is informed and believes, all the real property within the State of New York of which said decedent died seized, or which otherwise belonged to him at the time of his death, or in which he had any interest, to wit: Parcel No. 1. (Description.)

The value of said premises constituting parcel No. 1 is, in the judgment of your petitioner, \$. The said parcel is occupied by your petitioner.

The said parcel No. 1 is subject to a lien, viz., a mortgage for \$, made by decedent and his wife to , of , Fulton county, N. Y., dated , 1895. The whole principal sum secured by said mortgage became due and payable on the day of , 1895. The interest on said mortgage has been paid up until , 1896.

Parcel No. 2. (Description.)

The value of said premises constituting parcel No. 2 is, in the judgment of your petitioner, \$.

Said parcel No. 2 is not subject to any charge or lien, and that said parcel was not specifically devised, except a part and parcel thereof, described as follows:

The said parcel of land so devised was, at the time of the death of said decedent, occupied by , to whom said parcel was devised, and has remained in her possession ever since, but has not been sold by her as your petitioner is informed and believes.

The value of the parcel specifically devised is, in the judgment of your petitioner, \$.

In the judgment of your petitioner that portion of parcel No. 2 above described, as specifically devised to , will be required to be sold, together with all the real estate herein described, for the payment of the debts of the said decedent.

Parcel No. 3. (Description.)

Said parcel No. 3 is not subject to any charge or lien, and that said parcel was not specifically devised.

The value of said premises constituting parcel No. 3 is, in the judgment of your petitioner, \$.

Parcel No. 4. (Description.)

The said parcel of land No. 4 was sold by the said in his lifetime, to , who holds a contract from said decedent for the purchase of said premises, for the sum of \$, and there has been paid thereon the sum of \$, and upon the payment of the balance of the said purchase price will be entitled to a deed of the said premises.

And your petitioner is informed that the said is ready to pay the balance due on said contract, and take the deed provided for in said contract, and your petitioner asks leave of the court to convey according to the terms of said contract upon receiving the balance due for the purchase price.

Ninth. Each of the parcels of land hereinbefore described is improved and cultivated, except parcels numbers .

Tenth. All of the land of which the said testator died seized or possessed is subject to the dower of , widow of said decedent, your petitioner, who is willing to join in a conveyance of said property upon receiving a sum of money equal to the value of her dower in said premises, calculated on the annuity table.

Eleventh. The names of the wife and of the heirs and devisees of the said decedent, and of every other person claiming under them, or either of them, and their residences, are as follows: (Put in names.)

Twelfth. That no previous application has been made for a decree authorizing the disposition of the real property of said decedent for the payment of his debts or fun-

eral expenses, and that three years have not elapsed since letters of administration have been granted your petitioner.

Wherefore, your petitioner prays that a decree be made directing the sale of the said real property of said decedent, or so much thereof as may be necessary for the payment of his debts, and that all parties interested therein may be cited to show cause, if any there be, why such a decree should not be made.

.....

Petitioner.

STATE OF NEW YORK, }
County of , } ss.:

, being duly sworn, says that she is the petitioner named in the foregoing petition by her subscriber, and that she has heard the same read, knows the contents thereof, and that the same is true of her own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

.....

Subscribed and sworn to before me this
 day of , 189 .

.....

Notary Public.

SCHEDULE "A."

.....

Petitioner.

Order for Citation.

(See text, page 312.)

At a term of the Surrogate's Court held in and for
the county of _____, at the Surrogate's
office in the village of _____, on the
day of _____, 189 ____.

Present — Hon. _____, Surrogate.

In the Matter of the Application of _____, as Administratrix, etc., of _____, Deceased, for Leave to Sell Real Estate of Said De- ceased for the Payment of His Debts and Funeral Expenses.
--

On reading and filing the petition of _____, adminis-
tratrix aforesaid, verified the _____ day of _____, 189 __,
and presented this _____ day of _____, 189 __, praying
for leave to mortgage, lease or sell the real property of
said decedent for the payment of his debts and funeral
expenses, and it appearing to the Surrogate that said peti-
tion has been presented within three years since letters
of administration on the estate of said decedent were
granted; and the Surrogate being satisfied by the said
petition, and by due inquiry by him made, that all the
facts specified in section 2752 of the Code of Civil Pro-
cedure, have been ascertained, and are stated in said peti-
tion; and it appearing to the Surrogate in the matter
aforesaid, that the debts and funeral expenses of said
decedent cannot be paid without resorting to the real
property of said decedent.

Now, on motion of Clarence W. Smith, attorney for said
petitioner, it is

Ordered, That a citation issue out of this court upon
said petition requiring (here insert the names of the heirs

and devisees of decedent) to appear before said Surrogate on the day of , 189 , at o'clock noon, then and there to show cause why authority should not be given to the said administratrix to mortgage, lease or sell the said real property of the said decedent to pay his debts and funeral expenses.

And it further appearing to the court that the following named creditors have presented their claims to the administratrix, whose names are as follows, to wit (insert names of creditors), it is, therefore,

Ordered, That said above-named creditors shall also be cited to appear upon said day and date to prove their said debt or lien against the said decedent.

.....

Surrogate.

Citation.

(See text, page 312.)

The People of the State of New York to (names of all the heirs and devisees), and to (names of all creditors who have presented claims, and all other creditors):

You and each of you are hereby cited and required personally to appear in the Surrogate's Court before our Surrogate of the county of , at his office in the of , on the day of , 189 , at o'clock in the noon of that day, then and there to show cause, if any there be, why the property of should not be sold for the payment of decedent's debts and funeral expenses, and for the establishment of any claim or claims against the estate of said , deceased. If any of the persons interested be under the age of twenty-one years they are required to appear by their guardian, if they have one, or if they have none that they appear and apply for one to be appointed, or in event of their neglect

or failure to do so, a guardian will be appointed by the Surrogate to represent and act for them in the proceeding.

In testimony whereof, we have caused the seal of office of said Surrogate to be hereunto affixed.

Witness, Hon. _____, Surrogate of our
[L. S.] said county, at _____, the _____ day
of _____, in the year of our Lord one thousand
eight hundred and ninety-six.

.....
Surrogate.

Order Appointing Commissioners.

(See text, page 314.)

At a term of the Surrogate's Court, held in and for
the county of _____, at the Surrogate's
office in the village of _____, on the
day of _____, 189 _____.

Present — Hon. _____, Surrogate.

In the Matter of the Application of _____, as Administratrix, etc., of _____, Deceased, for Leave to Sell Real Estate of Said De- ceased for the Payment of His Debts and Funeral Expenses.
--

It appearing to the court that on the _____ day of
_____, 189 _____, one _____, as administratrix of the
estate of _____, having duly presented to this court
a petition in writing asking for the sale of the property
of _____, deceased, for the payment of his debts and
funeral expenses.

And it appearing to the court that the proceedings have
been taken in conformity to the section of the Code relat-

ing to the sale of decedent's real property to pay debts or liens or both, for which said sale is demanded, are the debts of the decedent, and are just and reasonable charges for his funeral expenses existing at his death, and are past due, and are not secured by a mortgage or expressly charged by will upon the decedent's real property or interest in real property, and that the property desired to be disposed of is not devised expressly charged with the payment of his debts, and that all personal property which could have been applied to the payment of decedent's debts and funeral expenses has been so applied, and that it is insufficient for the payment of decedent's debts as established by the decree. It is, therefore,

Ordered, That _____, of _____, and _____, of _____, and _____, of _____, county of _____, State of New York, be and are hereby appointed commissioners to examine and appraise each parcel of the real estate of the decedent, and ascertain its real value and its market value, and report the same, and ascertain if money can be raised on the real property either by lease or mortgage on said property, or if sufficient moneys cannot be raised by mortgage or lease, to pay said debts as aforesaid; giving a description of said real estate, and describe each parcel and state the value thereof, and its rental value, and that they do make their report duly signed and verified according to the statute as provided, and file the same in this court.

.....

Surrogate.

Order to Sell.

(See text, page 315.)

At a term of the Surrogate's Court, held in and for
the county of _____, at the Surrogate's
office in the village of _____, on the
day of _____, 1897.

Present — Hon. _____, Surrogate.

In the Matter of the Application of _____, as Administratrix, etc., of _____, Deceased, for Leave to Sell Real Estate of Said De- ceased for the Payment of His Debts and Funeral Expenses.
--

_____, of _____, _____ county, N. Y., the
administratrix of _____, deceased, late of _____,
_____ county, N. Y., having heretofore and within
three years after the issue of letters upon said estate, duly
presented to the Surrogate's Court of the county of _____,
her petition, on the _____ day of _____, 1896, praying for
a decree for the sale of the decedent's real property for the
payment of his debts and funeral expenses, and the Sur-
rogate having been duly satisfied, upon proper inquiry and
evidence, that a proper case was made and duly presented,
and having thereupon caused a citation to issue out of this
court requiring (names of heirs and devisees) to appear
before him, the said Surrogate, upon such application, on
the _____ day of _____, 189_____, to show cause why such
order should not be made, if any there should be; and on
the _____ day of _____, 189_____, the petitioner appeared
in person and by _____, her attorney, and filed proof
of the due service of the citation herein, upon each of the
persons named in said citation, according to law; and it
appearing that _____ were infants, and that

was duly appointed special guardian for said infants in this proceeding, to appear and look after their interests, who duly appeared in person and by _____, as attorney, for said infants; and the said _____ also appeared for _____, as her attorney; and it appearing to the satisfaction of the Surrogate that a large number of creditors having claims against the estate of the said deceased had not appeared, nor been cited to appear on said hearing upon the said application, the said Surrogate thereupon caused a citation to issue out of this court requiring the said persons claiming to be creditors of the said estate, viz. (creditors), to appear before him, the said Surrogate, upon such application, on the _____ day of _____, 1897, at ten o'clock in the forenoon of that day, to establish any claim they might have against the said deceased in this proceeding, and the said hearing was thereupon duly adjourned, by consent of all parties appearing, to the said _____ day of _____, 189____, and citation issued and returned with due proof of service thereof, on each of the persons and parties therein named, or their personal representatives, according to law; and all of the said persons and parties having duly appeared in person or by attorney, and the said infants appearing by their said special guardian, and the matter having been regularly called in court by the said Surrogate, and the said Surrogate, having, upon the return of the citation as aforesaid, proceeded to hear the allegations and proofs of the parties, and the hearing having been duly adjourned from day to day, until the _____ day of _____, 189____, and after due examination as aforesaid had, it having been established to the satisfaction of the said Surrogate:

First. That the said petitioner has fully complied with the requisite provisions of the statutes concerning the disposition of decedent's real property for the payment of debts and funeral expenses, and that the proceedings

herein have been in conformity with title 5 of chapter 18 of the Code of Civil Procedure.

Second. That the following claims for the purpose of paying which this decree is made, are valid and subsisting debts against defendant's real property, and are all past due, and that the funeral expenses and all claims allowed herein are justly due and owing, to wit:

Creditors.	Residence.	Amount.
.....		
.....		

Third. That the claims above allowed amount in the aggregate to \$, and that none of them are secured by any judgment or mortgage which is a lien upon the decedent's real property nor expressly charged by said decedent's will upon his real property or upon any interest in real property.

Fourth. That the said , the said administratrix, has proceeded with reasonable diligence in converting the personal property into money, and applying it to the payment of the debts and funeral expenses of said decedent, and that it is insufficient for the payment of the same as established by this decree; and said Surrogate, having thereupon duly inquired by the appointment of commissioners whether sufficient money can be raised advantageously to the persons interested in said real property by a lease or mortgage thereof; and having ascertained that sufficient money cannot be so raised advantageously as aforesaid, as shown by the report of said commissioners.

Now, on motion of , attorney for said , administratrix, it is

Ordered, adjudged and decreed:

First. That the claims of (names of all claims), hereinbefore named, in the amounts hereinabove respectively

stated, are valid and subsisting claims against said decedent's estate, and that the claims of (names of claims rejected) hereinbefore named, are not valid subsisting claims against decedent's estate, and are hereby disallowed.

Second. That for the purpose of paying the debts hereinbefore established, a sale of the following described real property, of which said decedent died seized, or so much thereof as may be necessary to pay such debts, be made by _____, the said administratrix, upon her executing and filing with the Surrogate of this county the bond prescribed by law, in the penalty of \$ _____, with two or more sureties, or in case of her failure to do so, by a freeholder to be appointed by the Surrogate as prescribed by law.

Parcel No. 1. (Description.)

And it appearing to said Surrogate that said parcel No. 4 is subject to a contract in writing between _____ and _____, dated _____, 189____, for the sale thereof, for the sum of \$ _____, to the said _____, on which there has been paid the sum of \$ _____, and interest to the _____ day of _____, 189____, and it appearing that the said _____ is ready to pay the balance unpaid on said contract. It is further

Ordered, That the said administratrix make, execute and deliver to the said _____, a deed of said premises pursuant to the said contract, upon his paying the balance of said purchase price, and in case the said _____ fails or refuses to pay the balance of said purchase price under said contract before the day of sale of the real estate, as hereafter provided in this proceeding, then all the right, title and interest of said decedent in said parcel No. 4 shall be sold separately, and first in order of the sale of the several parcels of land herein directed to be sold,

and subject to the rights of the said _____ under
said contract.

And it appearing to the Surrogate that a sale of a sufficient part of said real property to pay the debts of said decedent, to which it is justly applicable, would be to the best interests of all said parties interested therein; it is further

Ordered, That the said parcels of land herein described be sold in the following order: (Give the order.) And it is further

Ordered, That the person making such sale shall proceed with all convenient speed in executing this decree, and make due report to this court.

.....

Surrogate.

Bond of Administrator.

(See text, page 316.)

Know all men by these presents:

That we, _____, principal, of _____,
county, N. Y., and _____, sureties,
of _____, _____ county, N. Y., are held and firmly
bound unto the people of the State of New York in the
sum of \$ _____, lawful money of the United States of
America, to be paid to the said people, for which payment
well and truly to be made we bind ourselves, our and each
of our heirs, executors and administrators, jointly and
severally, firmly by these presents.

Sealed with our seals this _____ day of _____, in the
year one thousand and ninety _____.

Whereas, the above bounden, _____, the adminis-
tratrix of _____, deceased, lately applied to the Sur-
rogate's Court of the county of _____, for authority to

dispose of as much of the real property of the said , deceased, as shall be necessary to pay his debts, etc. And

Whereas, such proceedings in due form of law have been thereupon had that the said Surrogate has decreed a sale of so much of the real property whereof the said decedent died seized, as shall be sufficient to pay the debts of the said decedent, which the Surrogate has adjudged valid and subsisting pursuant to the statute.

Now, the condition of this obligation is such that if the said shall faithfully perform the duties imposed upon her by said decree, and shall pay into the said Surrogate's Court within twenty days after the receipt thereof by her all moneys arising from such sale, and shall deliver to the said Surrogate within the same time all the securities taken thereupon, and shall account for all moneys received by her whenever she is required to do so, by a court of competent jurisdiction, then this obligation to be void, otherwise to remain in full force and effect.

..... [Seal.]

..... [Seal.]

..... [Seal.]

STATE OF NEW YORK, {
County of , } ss. :

On this day of , 189 , before me, the undersigned, personally appeared , to me known to be the same persons described in and who executed the foregoing instrument bond, and severally acknowledged that they executed the same.

.....
.....

(Justification.)

Order to Execute the Decree.

(See text, page 317.)

At a term of the Surrogate's Court, held in and for
the county of _____, at the Surrogate's
office in the village of _____, on the
day of _____, 189 .

Present — Hon. Thomas McGann, Surrogate.

In the Matter of the Application of _____, as Administratrix, etc., of _____, Deceased, for Leave to Sell Real Estate of Said De- ceased for the Payment of His Debts, etc.
--

A decree having heretofore been made herein by the
said Surrogate's Court, entered the _____ day of _____,
189 , upon a petition duly presented, and the due citation
of the proper persons authorizing the sale of certain real
property of said decedent in said decree described, for the
payment of his debts, and _____, the administratrix
therein named, having duly given and on the _____ day
of _____, 189 , filed in the office of the said Surrogate,
the bond required by law and by said decree, with the
requisite justification of sureties, which said bond is
hereby approved by the Surrogate.

Now, on motion of _____, attorney for said admin-
istratrix, it is

Ordered, That said _____ proceed to execute the
said decree with respect to all the real property therein
named.

.....

Surrogate.

Notice of Sale.

(See text, page 317.)

SURROGATE'S COURT —

COUNTY.

In the Matter of the Application of , as Administratrix, etc., of , Deceased, to Sell Real Estate of Said Deceased for the Payment of his Debts, etc.
--

In pursuance of an order of the Surrogate's Court of the County of Hamilton, duly made and entered on the day of , 189 , the undersigned, , as administrator, etc., duly authorized by said order to sell certain real property belonging to the estate of , deceased, will sell at public sale to the highest bidder, at the in the village of , county, N. Y., at o'clock in the afternoon on the day of , 189 , the following described real estate, to wit: (Description.)

Ten per cent of the amount bid must be paid at the time of the sale, and the balance of the purchase price bid must be paid at the delivery of the deed.

.....

,as Administra .

Affidavit of Posting.

(See text, page 317.)

SURROGATE'S COURT — COUNTY OF

In the Matter of the Disposition of the Real Estate of _____, De- ceased, for the Payment of His Debts, etc.

STATE OF NEW YORK, { ss.:
County of _____,

_____ of the town of _____, N. Y., being duly sworn, says that on the _____ day of _____, 189____, and at least eighty-four days before the day of sale mentioned in the annexed printed notice, he affixed a true copy of said notice of sale of real property in at least three conspicuous places in the town of _____, county of _____, State of New York, where said property, directed to be sold, is situated, upon the following places, to wit: On the bulletin board of the town clerk's office, on the store of _____, and on the front of the _____ office.

.....

Subscribed and sworn to before me this
day of _____, 189____.

.....

Notary Public.

Affidavit of Mailing.

(See text, page 317.)

In the Matter of the Sale of Real Estate of _____, Deceased.

STATE OF NEW YORK, {
County of _____, } ss.:

_____, being duly sworn, says that he is the attorney for the petitioner in the above-entitled matter, and resides at _____, _____ county, New York, where he has an office for the regular transaction of business.

That on the _____ day of _____, 189____, he deposited in the post-office at _____, New York, copies of the notice of sale in the above-entitled matter, which is hereto annexed, one of each inclosed in a securely closed postpaid wrapper, addressed to each of the following-named persons, firms and creditors in the above-entitled matter, at the address written after the name of each respectively, that being the last known place of residence or post-office address of each, as deponent is informed and believes, between which said places and said city of _____, New York, there then was and now is a regular communication by mail, as deponent verily believes. (Names and residences.)

Subscribed and sworn to before me this
day of _____, 189____.

.....

Notary Public.

Terms of Sale.

(See text, page 317.)

In the Matter of the Sale of the Real Estate of , Deceased, for the Payment of His Dehts.
--

Premises described in the annexed notice of sale as parcel No. , will be sold under the direction of , administratrix, etc., upon the following terms:

First. Ten per cent of the purchase money of said described property will be required to be paid to the said at the time and place of sale, for which her receipt will be given.

Second. The balance of said purchase money will be required to be paid to the said at her residence in , N. Y., at the time when the deed for said described property is ready for delivery.

Third. If the said purchaser neglects to receive his said deed when notified that the same is ready for delivery, he will be charged with interest thereafter on the whole amount of his purchase from said time.

Fourth. All taxes, assessments and other incumbrances which at the time of sale are liens and incumbrances upon said premises, will be allowed by the said administratrix out of the purchase money, provided the purchaser shall, previous to the delivery of the deed, produce to the administratrix proof of such liens and duplicate receipts for the payment thereof.

Fifth. The purchaser of said premises or any portion thereof will, at the time and place of sale, sign a memorandum of his purchase.

Sixth. The bidding will be kept open after the property is struck down, and in case any purchaser shall fail

to comply with any of the above conditions of sale, the premises so struck down to him will again be put up for sale under these same terms of sale without application to the court, unless the administratrix's attorney shall elect to make such application, and such purchaser will be held liable for any deficiency there may be between the sum for which said premises shall be struck down upon the sale and for which they may be purchased at the resale; and also any costs and expenses occurring on such resale.

Dated , N. Y., this day of , 189 .

.....

MEMORANDUM OF SALE.

I, , have this day of , 189 , purchased the premises described in the annexed printed advertisement of sale as parcel No. , for the sum of \$, and hereby promise and agree to comply with the terms and conditions of the sale of said premises as above mentioned and set forth, after confirmation of this sale by the Surrogate's Court.

Dated , 189 .

.....

Received from , the sum of \$, being , 189 .
ten per cent of the amount paid by him for property sold by me under the order of the court, in the above-entitled proceeding.

.....

Administratrix.

Report of Sale.

(See text, page 318.)

SURROGATE'S COURT — COUNTY OF

In the Matter of the Disposition of the Real Estate of _____, De- ceased, for the Payment of His Debts, etc.

To Hon. _____, Surrogate of the County of _____ :

I, _____, administra _____ with the will annexed, of the estate of _____, late of _____, deceased, report and return my proceedings under the decree of sale of the real estate of the said deceased, granted by the Surrogate of _____ county on the _____ day of February, 1897, as follows:

I caused a notice that the said real estate would be sold at public auction at the _____, in the town of _____, on the _____ day of _____, 189 , at _____ o'clock in the afternoon of that day, to be posted for six weeks previous to the day appointed for the said sale, in more than three of the most public places in the town of _____, in which all of the said real estate is situated, and the same notice to be published for six weeks successively previous to the day appointed for the said sale, in the newspaper entitled _____, printed in the town of _____, a copy of which said notice, with the proof of such posting and publication thereof, is hereunto annexed.

That at _____ o'clock in the afternoon on the said day of _____, 189 , at the _____, in the town of _____, wherein the premises ordered to be sold are situated, I sold at public auction the whole of the real estate mentioned and described in said order of sale, as follows; and

which said real estate is mentioned and described in said order of sale as follows: (Description.)

And I do further report that the premises described herein above as first, and also described in the said decree for the disposal of real estate, was sold to for the sum of \$, subject to the approval of this court, he being the highest bidder therefor, and that being the highest sum bid therefor, which said sum is a fair and adequate consideration for said premises, as I verily believed, which said parcel is described as follows: (Description.)

(Continue as above with each parcel sold.)

STATE OF , } ss.:
County of , }

 , being duly sworn, says that he has read the foregoing report and knows the contents thereof, and that the same is true of her own knowledge except those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

.....

Subscribed and sworn to before me this
day of , 189 .

.....

Notary Public.

Order of Notice of Confirmation.

(See text, page 318.)

SURROGATE'S COURT —

COUNTY.

At a term of the Surrogate's Court held in and for
 the county of _____, at the office of Hon.
 _____, in the town of _____, N. Y.,
 on the _____ day of _____, 189 .

Present — Hon. _____, Surrogate.

In the Matter of the Disposition of the Real Estate of _____, De- ceased, for the Payment of His Debts, etc.
--

It appearing to the court that _____, administra-
 with the will annexed, of _____, deceased, has this
 day filed his report of sale of the real property heretofore
 by this court ordered to be sold by an order dated the 5th
 day of _____, 189 , whereby by said return it appears
 to the court that the said _____ did in all things sell
 said real estate as by said order directed, at the place and
 times as directed, after giving due notice of said sale; and
 it further appearing to the court that said administra-
 has brought into court the proceeds obtained by him on
 such sale, and asks an order confirming said sale.

Now, on motion of _____, attorney for said
 administra _____, it is

Ordered, That notice be given to all persons interested
 therein, as appears by said decree of sale, to be and appear
 before the court on the _____ day of _____, 189 , to show
 cause, if any there be, why an order confirming said sale
 in all things should not be made, and authorizing said
 administra _____ to make, execute and deliver conveyances
 for the full and complete title of the premises so sold by
 him. It is further

Ordered, That a service of said notice shall be made upon each of said persons entitled to share in the proceeds of said sale, by depositing the same in a securely closed postpaid wrapper in the post-office at _____, N. Y., directed to each one, at his last known place of residence, on or before the _____ day of _____, 189____, which said service shall be sufficient for the purposes of this order.

.....

Surrogate.

Notice to Show Cause.

(See text, page 318.)

SURROGATE'S COURT.

In the Matter of the Disposition of the Real Estate of _____, De- ceased, for the Payment of His Debts, etc.

Whereas, _____, as administra _____ of _____, deceased, did on the _____ day of _____, 189____, file his report of sale of the real property described in an order or decree for the disposal of the real estate of said deceased, made by the Surrogate's Court of _____ county, dated the _____ day of _____, 189____, whereby he was directed to sell the said real estate; and said report of sale recites that the said administra _____ has sold all of the real estate belonging to the said decedent at the time of his death, as in said order directed.

You are hereby notified and required to be and appear before the Surrogate's Court of the county of _____, at the office of the Surrogate in the city of _____, N. Y., on the _____ day of _____, 189____, at _____ o'clock in the noon, to show cause, if any there be, why an order confirming said sale in all things, and authorizing the said

administra to make, execute and deliver conveyances for the full and complete title of the premises so sold by him should not be made.

Dated day of , 189 .

.....

Attorney for said Administrator.

Office and post-office address,

(Name of creditor.)

Affidavit of Mailing Notice.

(See text, page 318.)

In the Matter of the Sale of the Real Estate of , Deceased.

STATE OF NEW YORK, }
County of Fulton, } ss.:

, being duly sworn, says that he is the attorney for the petitioner in the above-entitled matter, and resides at , N. Y., where he has an office for the regular transaction of business.

That on the day of , 189 , he deposited in the post-office at , N. Y., copies of the notice of confirmation of sale in the above-entitled matter, which is hereto annexed, one of each in a securely closed post-paid wrapper, addressed to each of the following named persons, firms and creditors in the above-entitled matter, at the address written after the name of each respectively, that being the last known place of residence or post-office address of each, as deponent is informed and believes, between each of which places and said city of , N. Y., there then was and now is a regular communication by mail, as deponent verily believes.

(Names and residences of each.)

.....

Subscribed and sworn to before me this
day of , 189 .

.....

Notary Public.

(Attach copy of notice.)

Order Confirming Sale.

(See text, page 319.)

At a term of the Surrogate's Court held in and for
the county of , at the Surrogate's office
in the village of , on the day of
, 189 .

Present — Hon. , Surrogate.

In the Matter of the Application of , as Administrator, etc., of , Deceased, for Leave to Sell Real Estate of Said Deceased, for the Payment of His Debts and Funeral Expenses.
--

A decree having been duly made by the Surrogate's Court of the county of , on the day of , 189 , authorizing the said , administrator with the will annexed, of , deceased, to dispose of the said decedent's real property mentioned and described in the said decree, to raise money to pay the debts therein mentioned and established, and after a bond having been duly given by said , and an order for the execution of said decree having been duly made by said Surrogate's Court on the day of , 189 , and said having made and filed his report of the sale made pursuant to said decree, showing that after posting and publishing due notice of the time and place

of holding the said sale, according to law, he did, on the _____ day of _____, 189____, at _____ o'clock in the noon at the time mentioned in said notice, at the _____, in the city of _____, N. Y., the place mentioned in said notice, sell at public auction all the right, title and interest of _____, deceased, in the following-described premises, being parcel No. 1 of the property mentioned and described in said order, to wit (description), together with all and singular the tenements, hereditaments and appurtenances to the said premises belonging or in any wise appertaining, to _____, for the sum of \$ _____, he being the highest bidder therefor, and that being the highest sum bid for said parcel.

Also (continue as to each parcel).

All of which said parcels so sold to _____ and _____, amounts in the aggregate to the sum of \$ _____.

And the said _____ having this day appeared in person and by _____, his attorney, and due proof of service of notice of this motion on (names of all creditors), agreeable to the order herein named, on the _____ day of _____, 189____, having been now read and filed, and _____ having appeared in person, and no one appearing to oppose the confirmation of said sale (or _____ appearing in opposition thereto), and the said Surrogate having duly inquired into the proceedings, and it appearing by proof satisfactory to the said Surrogate that the proceedings were fair, and that the acts were done which are required by law to be done, after the said order directing the execution of the decree, to authorize the said Surrogate to make this order of confirmation, and that said sale was legally made and fairly conducted, and that the sums bid for the said lots and parcels were not disproportionate to their value respectively. Now, on motion of _____, attorney for said _____, administrator,

It is ordered,

First. That the said sale of the said several parcels of said real property and interest in real property, so as aforesaid made by said , and his report thereof, and everything therein contained, be and the same is hereby ratified and confirmed.

Second. That the said , as administrator aforesaid, execute and deliver the proper conveyances of the said several lots and parcels to the purchasers thereof respectively, at such sale, upon compliance upon the part of such purchasers respectively, with the terms and conditions upon which such sales were made.

.....

Surrogate of County.

Order to Pay Moneys to the County Treasurer.

(See text, page 320.)

At a term of the Surrogate's Court, held in and for
the county of , at the Surrogate's
office in the village of , N. Y., on the
day of , 189 .

Present — Hon. , Surrogate.

In the Matter of the Distribution of the Proceeds of the Sale of the Real Estate of , Deceased.
--

A decree having been duly made by the Surrogate's Court of county on the day of , 189 , confirming in all things the sale of the real estate of said , deceased, by , as administrator, and also ordering and directing that the said , as such administrator, do make, execute and deliver to the purchasers therein named, proper convey-

ances conveying the right, title and interest of said
in said property, and also on said day the said Surrogate's
Court did make an order that the proceeds of said sale be
divided among the creditors, according to law, at the Sur-
rogate's office in the city of _____, on the _____ day of
_____, 1897, and that notice of the time and place of
making such distribution be duly given according to law.

Now, on motion of _____, attorney for said adminis-
trator, it is

Ordered, That the said moneys so received by said
_____, as administrator, be brought into court and
paid to the county treasurer of _____ county, N. Y., to
be by him paid out and distributed according to and
under the directions of the said Surrogate's Court of
_____ county.

.....

Surrogate.

Order for Notice of Distribution.

(See text, page 319.)

At a term of the Surrogate's Court, held in and for
the county of _____, at the Surrogate's
office in the town of _____, N. Y., on the
_____ day of _____, 189 .

Present — Hon. _____, Surrogate.

In the Matter of the Distribution of the Proceeds of the Sale of the Real Estate of _____, Deceased.

_____, administrator, having brought into the
office of the Surrogate of the county of _____, the moneys
arising from the real estate of the said _____, deceased,
lately made by him upon the order of the Surrogate,

It is ordered, That such proceeds be divided among the creditors, according to law, at the Surrogate's office in the city of _____, on the _____ day of _____, 189____, at _____ o'clock in the _____ noon, and that notice of the time and place of making such distribution be published for six weeks immediately preceding said day, in the newspaper entitled _____, printed in the county of _____ (same county of Surrogate).

.....
Surrogate.

Notice of Distribution.

(See text, page 319.)

SURROGATE'S COURT.

In the Matter of the Distribution of the Proceeds of the Sale of the Real Estate of _____, Deceased.

Notice is hereby given that the balance remaining of the proceeds of the sale of the real estate of _____, late of _____, deceased, lately made under an order of the Surrogate of the county of _____, by _____, administratrix, with the will annexed, will be distributed by the said Surrogate among the creditors of the said deceased in proportion to their respective debts, according to law, at the Surrogate's office in the town of _____, on the _____ day of _____, 189____, at _____ o'clock in the _____ noon of that day.

Dated _____, 189____.

.....
Surrogate.

Consent to Accept Gross Sum in Lieu of Dower.

(See text, page 319.)

Whereas, _____, administratrix, with the will annexed, has recently sold the real estate whereof the said _____ died seized or had an interest therein, upon an order of the Surrogate of the county of _____, authorizing her to sell the same for the payment of the debts of the said deceased, and has brought the moneys arising from such sale into the office of the said Surrogate for the purpose of distributing.

Now, these presents witness, That I, _____, widow of the said _____, deceased, do hereby consent to accept in lieu of my dower such sum in gross as shall be ascertained to be equal to the value of my right of dower of the gross proceeds of said property according to the principles applicable to life annuities.

In testimony whereof, I have hereunto set my hand and seal this _____ day of _____, 189 _____.

STATE OF NEW YORK, }
County of _____, } ss. :

This is to certify that on this _____ day of _____, 189 _____, the person named in the foregoing instrument, personally appeared before me and she acknowledged that she executed the same.

.....
Notary Public.

Final Order of Distribution.

(See text, page 320.)

At a term of the Surrogate's Court held in and for
the county of _____, at the Surrogate's
office in the village of _____, N. Y., on the
day of _____, 189 .

Present — Hon. _____, Surrogate.

In the Matter of the Application of _____, as Administratrix, etc., of _____, Deceased, for Leave to Sell Real Estate of the Said Deceased, for the Payment of His Debts and Funeral Expenses.

Notice that a distribution of the proceeds arising from the sale of the real estate in this matter would be made on the _____ day of _____, 189 , having been duly published, and the said proceeds having been paid into Surrogate's Court, amounting to \$5,740, it is

Ordered, That the County Treasurer of _____ county retain in his hands the sum of \$57.40 as and for his commissions for receiving and disbursing the said funds in this proceeding.

Second. It is further ordered, that the said County Treasurer pay to _____, administratrix, etc., and the petitioner in this proceeding, the sum of \$ _____, which sum is hereby fixed, determined and allowed as and for her reasonable charge, expense and disbursements in this proceeding.

Third. It is further ordered, that out of the balance of the moneys, after paying said charges, expenses and disbursements of this proceeding, there be paid to _____, widow of the said _____, deceased, the sum of \$ _____,

which sums he has consented, by a paper duly executed and authenticated by her, to accept in lieu of her dower right in the premises so sold.

Fourth. It is further ordered, that out of the remainder of said sum there be paid to _____, Esq., the attorney for the petitioner, the sum of \$ _____ costs, which sum is hereby awarded and allowed to the petitioner as a reasonable compensation for his services and disbursements as attorney of the petitioner in this proceeding.

Fifth. It is further ordered, that out of the remainder of the said sum there be paid to _____, or to their attorney, _____, for them, the sum of \$ _____, which sum is hereby allowed as the unpaid balance of the funeral expenses of the decedent.

Sixth. And it also appearing to the court upon this hearing for distribution in pursuance of said notice, and upon the hearing on the order of sale, that the following demands of the following-named persons have been and were established as valid and subsisting demands against the said _____, deceased, and are the only demands established, it is further

Ordered, That the remainder of the money, to wit: The sum of \$ _____, be distributed among the creditors of the deceased, whose debts have been established as set forth in this order. That said persons' names are mentioned in the first column of the following list, and the amount at which each claim is established and allowed in the second column opposite each name, and the amount to which each is entitled and the sum which each shall be paid upon this distribution, this day ordered, in the third column opposite each name, as follows: (Insert names.)

Seventh. It is further ordered, that the bond of the said _____, and the sureties thereon, given by her

in the above-entitled matter, be and they are hereby discharged, and that she be and hereby is discharged from all further liability in and on account of this proceeding.

Widow's Release to Treasurer.

SURROGATE'S COURT.

In the Matter of the Application of _____, as Administratrix, etc., of _____, Deceased, for Leave to Sell Real Estate of the Said Deceased, for the Payment of His Debts and Funeral Expenses.

Know all men by these presents:

That I, _____, widow of _____, deceased, of _____, _____ county, N. Y., do hereby acknowledge the receipt of the sum of \$ _____, to me in hand paid by _____, County Treasurer of _____ county, being in full for the amount directed to be paid to me in lieu of my dower right in the premises sold in the above-entitled proceeding, by the decree and order made by the Surrogate's Court of _____ county, on the _____ day of _____, 189 _____, and I hereby release and discharge said County Treasurer of and from all claims and demands upon and on account of the provisions of said decree and order so allowing, awarding and directing to be paid to me the said sum of \$879.50, as and for my dower in the premises so sold in the above-entitled proceeding.

.....[Seal.]

STATE OF NEW YORK, }
County of , } ss.:

On this day of , 189 , before me personally came , to me known and known to me to be the individual described in and who executed the foregoing receipt and release, and she acknowledged that she executed the same.

.....

Notary Public.

CHAPTER IX.

ACTION BY A CREDITOR AGAINST HEIRS AND DEVISEES
AFFECTING DECEDENT'S REAL PROPERTY.

An action may be maintained by a creditor of decedent against an heir or devisee upon a simple or special contract, or by a specialty, the extent of the estate, interest and right in the real property which descended to them from, or was effectually devised to them by the decedent.

Code, § 1843; *Armstrong et al. v. McKelvey*, 104 N. Y. 179; *Deyo v. Morse*, 144 N. Y. 216; *Fink v. Berg*, 50 Hun, 213; *Hayward v. McDonald*, 7 Civ. Pro. 100.

When action can be maintained.

Said action cannot be maintained except in one of the following cases:

First. Where three years have elapsed since the death of the decedent, and his letters testamentary or of administration have been granted upon his estate within the State.

Second. Where three years have elapsed since letters testamentary or of administration have been granted within the State.

Code, § 1844; *Cunningham v. Parker et al.*, 146 N. Y. 29; *Hamilton v. Smith*, 46 Hun, 651; *Mortimer v. Chambers*, 43 N. Y. St. R. 365.

Where action is commenced pending application to sell.

An action begun while proceedings are pending on a petition seasonably presented for sale of decedent's real estate to pay debts, all proceedings in said action subsequent to the complaint must be stayed by the court until the petition is disposed of or the plaintiff may elect to discontinue.

Code, § 1845.

When dismissed.

If a decree under the petition to sell is granted, and the property is disposed of in pursuance thereof, the action

must be dismissed unless the plaintiff has alleged in his complaint or does allege in a supplementary complaint that other property belonging to decedent descended to said heirs or was devised than that included in the decree of sale, and if the plaintiff elect to proceed as to that property he is entitled to a preference in payment out of such property, but he cannot share in the distribution of the money arising from the sale under the decree, and such property is in no way charged with his judgment.

Code, § 1845; *Raynor v. Gordon*, 23 Hun, 264.

The action must be joint.

This action must be brought jointly against all the heirs or all the devisees to whom the property was devised.

Code, § 1846; *Rogers v. Patterson*, 79 Hun, 483; *Mortimer v. Chambers*, 63 Hun, 335; *Hauselt et al. v. Patterson*, 124 N. Y. 349; *Wood v. Wood*, 26 Barb. 356-362.

Property which descended to the heirs first exhausted.

If the real estate which passed to the heirs is insufficient, the devisees are properly joined, but the judgment must direct that that which descended to the heirs be first exhausted.

Rockwell v. Geery, 4 Hun, 606.

Counterclaim.

A counterclaim to be interposed must be in favor of all defendants jointly.

Mortimer v. Chambers, 63 Hun, 335.

Each is liable respectively to the extent of the estate which descended to them.

Hayward v. McDonald, 7 Civ. Pro. R. 100.

PARTIES.

Plaintiff.

A creditor by contract, either a simple or by specialty, or any person having a claim against a decedent who died seized of real estate or an interest in real property, may be party plaintiff.

Code, § 1843.

Defendants.

Any heir of the decedent, or any person to whom decedent devised real property, or any person by, through or whom any person acquired any interest in said real property after the filing of a lis pendens, being joint owners thereof, shall be defendants and liable to the extent of their interest therein.

Code, §§ 1843 and 1846.

Apportionment of recovery.

Any sum recovered by plaintiff on account of his claim and his costs shall be apportioned among all the defendants in proportion to the value of the property descended to or devised to them.

Code, § 1847; *Fink v. Berg*, 50 Hun, 211; *Rogers v. Patterson*, 79 Hun, 483.

Requisite to recovery against heirs.

In an action against the heirs the plaintiff must show:

First. That the decedent's assets over and above the expenses of administration and debts superior to plaintiff's, were not sufficient to pay plaintiff's debt.

Second. That plaintiff has been or will be unable with due diligence to collect his debt by proceedings in the proper Surrogate's Court, or by action against the executor or administrator or surviving husband or wife or legatees and next of kin.

Code, § 1848; *Harris v. Clark*, 3 N. Y. 93; *Read v. Patterson*, 134 N. Y. 128; *Adams v. Fassett*, 73 Hun, 430.

Presumptive evidence.

The executor's or administrator's account as rendered to and settled by the Surrogate, may be used as presumptive evidence of any facts required to be shown by this section.

Code, § 1848; *Read v. Patterson*, 134 N. Y. 128.

When brought against the devisees.

If the action is brought against the devisees, the plaintiff must show in addition to that required in section 1848, either that the real estate which descended to the heirs was not sufficient to pay his claim, or that he has been

unable or will be unable to collect his debt by action from the heirs.

Code, § 1849; *Stuart v. Kissam*, 11 Barb. 271.

Measure of recovery.

Plaintiff can only recover in an action against the heirs that part which the assets are insufficient to pay, or that he is unable to collect from the executor or administrator, or the surviving husband, or wife, or next of kin, or legatees, and of the devisees only for the residue which the real estate descended, or the amount of his recovery against the heirs is insufficient to satisfy.

Code, § 1850; 61 N. Y. St. R. 279.

PARTIES.

Plaintiff.

Any person holding a claim against the decedent either upon a simple contract or a special contract.

Code, § 1843; *Armstrong v. McKelvey*, 104 N. Y. 179;

Mortgagee.

A mortgagee may maintain action to recover on a judgment for deficiency.

Lockwood v. Fawcett, 17 Hun, 146.

Creditors of decedent.

Only creditors of the decedent can maintain the action, a claim against the executor or administrator, as such, cannot be recovered against the heirs or devisees.

Hayward v. McDonald, 7 Civ. Pro. R. 100.

Defendants.

The heirs of an intestate and the heirs and devisees of a testator are liable to the extent of the estate, interest in and to the real property, which descended to or was effectually devised to them by the decedent.

Code, § 1843; *Clift v. Moses*, 116 N. Y. 144.

The personal representatives cannot be joined. The heirs must all be sued jointly and if the real estate which descended to them has been aliened the creditor, if he so elect, can charge them personally.

Haywood v. McDonald, 7 Civ. Pro. R. 100.

Limitation of the action.

The Statute of Limitation does not run during the three years.

Adams v. Fassett, 73 Hun, 430.

Held, that the limitation of ten years applied in.

Mortimer v. Chambers, 43 N. Y. St. R. 365.

Infancy.

This action is not delayed by reason of the infancy of any of the parties. Except execution cannot be issued against the infant until one year after final judgment and judgment-roll filed.

Code, § 1858.

Liability of the heir or devisee.

The liability of an heir or devisee is not affected for a debt of a testator by this proceeding, where the will expressly charges the debt upon the real property descended or devised or makes it payable by the heirs and devisee or out of the real property descended or devised before resorting to the personal property or to any other real property descended or devised.

Code, § 1859.

Action in more than one capacity.

Where a person takes real property in more than one capacity he may be proceeded against in either, without plaintiff first exhausting his remedy in the other.

Code, § 1860; Armstrong v. Wing, 10 Hun, 520.

PLEADINGS.**Complaint.**

The complaint must describe, with certainty, the real property descended or devised to the defendants and must specify the value.

Code, § 1851.

It should set forth all jurisdictional facts required in sections 1844 and 1845.

Answer.

May contain a general denial or set up any matter that would tend to defeat or lessen plaintiff's complaint.

Offset.

A claim to be set off must be in favor of all the defendants jointly as the action is a joint action against all the devisees.

Mortimer v. Chambers, 43 N. Y. St. R. 365.

In an action by an assignee of a claim or judgment a debt due by the assignor to defendant testator cannot be offset.

Armstrong v. McKelvey, 39 Hun, 213.

No claim established.

Defendants may plead that no claim was established or allowed by the executor.

Read v. Patterson, 45 N. Y. St. R. 793.

Defense of prior or equal claims.

Defendants may set up prior unsatisfied claims and that the value of the property received, devised or inherited by them does not exceed the amount of such valid prior demands.

Code, § 1856; Hausett v. Patterson, 124 N. Y. 349.

And if the defendant or a person belonging to this class has paid such demand such claim must be estimated and allowed.

Code, § 1857.

Costs.

Plaintiff is entitled to recover costs and if any one of the defendants put in a defense he is liable for the whole costs as there can be no apportionment.

Fink v. Berg, 50 Hun, 211.

Judgment.

Judgment is entered as in other cases and must direct that it be first satisfied out of the real property of decedent that descended or was devised to defendants that has not been aliened by such defendants.

Code, § 1852; Cunningham v. Parker, 146 N. Y. 29; Haywood v. McDonald, 7 Civ. Pro. 100.

Preference.

Such judgment is preferred to one obtained against defendant for his own individual debt or demand.

Code, § 1852.

Bona fide purchaser.

The title of a bona fide purchaser for value acquired before the filing of lis pendens or entry of judgment, is not affected.

Code, § 1853; *Rogers v. Patterson*, 87 Hun, 219; *Cunningham v. Parker*, 146 N. Y. 29.

When the land has been sold.

If it appears that the defendant has aliened the land before lis pendens was filed or action commenced, the plaintiff may, at his election, take judgment against the defendant for the value of the property so aliened, or so much thereof as may be necessary as in an action for the defendant's own debt.

Code, § 1854; *Rogers v. Patterson*, 79 Hun, 486; *Hausett v. Patterson*, 124 N. Y. 349.

Preferences.

In the proceeding to collect a debt due by a decedent against the surviving husband or wife, next of kin, legatees, heirs or devisees, the same preferences must be given to the payment of such debts as are provided in section 2719, Code, in relation to payment of debts by executors or administrators.

Code, § 1855.

The commencement of an action does not give preference.

Code, § 1855.

PRECEDENTS.

Lis Pendens.

(See text, page 367.)

WILLIAM R. NELLIS, Plaintiff,

against

GEORGE R. NELLIS, ELIZA J.
YOUNG, IDA M. BORIK and
EARL HOKE, Defendants.

Notice is hereby given in pursuance of section 2751 of the Code of Civil Procedure, of an action brought by William R. Nellis, plaintiff, against George R. Nellis, as administrator of the estate of Asenath E. Nellis, deceased, Eliza J. Young, Ida M. Borik and Earl Hoke, defendants, to recover judgment upon demands and claims for goods sold and work performed for said Asenath E. Nellis during her lifetime.

The following real property owned by the decedent in her lifetime and at the time of her death, situate in the county of Fulton, State of New York, bounded and described as follows: (Description), is affected by said action, and such real property will be held as security for any judgment obtained in the action.

Dated Johnstown, N. Y., this day of , 189 .

C. W. SMITH,

Plaintiff's Attorney.

Office and post-office address,

No. 2 North William Street,

Johnstown, N. Y.

To the Clerk of the County of Fulton:

Sir.— You are hereby directed to index the foregoing action to the names of the following defendants, to wit: George R. Nellis, Eliza J. Young, Ida M. Borik and Earl Hoke.

Yours, etc.,

CLARENCE W. SMITH,
Plaintiff's Attorney.

Complaint.

(See text, page 365.)

SUPREME COURT — FULTON COUNTY.

WILLIAM R. NELLIS, Plaintiff,

against

GEORGE W. NELLIS, ELIZA J.
YOUNG, IDA M. BORIK and
EARL HOKE, Defendants.

The plaintiff complains of the above-named defendants, and stated the following facts as constituting his cause of action:

First. Plaintiff alleges that on the 27th day of April, 1892, one, Asenath E. Nellis, of the town of Ephratah, county of Fulton and State of New York, died intestate, leaving her surviving William R. Nellis, this plaintiff herein, who was a son of decedent; George W. Nellis, her husband; Eliza J. Young, a daughter; Ida M. Borik, a daughter, and Earl Hoke, a grandson, and the only surviving child of a deceased daughter, defendants herein.

Second. Plaintiff further alleges that the only property of which the said Asenath E. Nellis was seized and possessed at the time of her death was the following described real estate, to wit: (Description.)

Third. Plaintiff further alleges that at the time of the decease of said Asenath E. Nellis, she was indebted to various persons, and among others this plaintiff, for work and labor performed and moneys expended for and on behalf of said deceased, in the sum of two thousand and sixty-four dollars and eighty-nine cents (\$2,064.89).

Fourth. Plaintiff further alleges that afterwards, to wit, on the 2d day of May, 1892, letters of administration were duly issued to George W. Nellis, one of the defendants herein, and that said George W. Nellis duly qualified and immediately entered upon his duties as such administrator.

Fifth. Plaintiff further alleges that thereafter, to wit, on or about the day of , 1892, he duly presented to the said defendant George W. Nellis, as administrator of the estate of said Asenath E. Nellis, deceased, a duly verified claim for his services performed and moneys expended which he held and had against the said deceased for the amount of one thousand eight hundred six dollars and eighty-nine cents (\$1,806.89), which said administrator received, filed and allowed for the full amount thereof, and acknowledged the said amount and claim as being just and correct.

Sixth. Plaintiff further alleges that thereafter, to wit, on the 6th day of July, 1892, he brought an action against said George W. Nellis, as administrator of the estate of said Asenath E. Nellis, deceased, to recover the amount of said claim, to wit, the sum of one thousand eight hundred six dollars and eighty-nine cents (\$1,806.89), which said claim arose upon a contract made with said deceased, for work and labor performed and moneys expended at her request and for her benefit; and that he prosecuted said action to a judgment which was filed, entered and docketed in the County Clerk's office of the County of Fulton, New York, and which said judgment remains wholly unpaid.

Seventh. Plaintiff further alleges that the other and only claims against the said estate of the said deceased, are as follows, to wit: H. S. Gale, M. D., for medical services and attendance on deceased, amounting to twenty-seven dollars (\$27); Frederick Saltsman, for two certain promissory notes amounting to one hundred forty dollars (\$140); Peter A. Beck, for funeral expenses, amounting to ninety-one dollars (\$91).

Eighth. Plaintiff further alleges, on information and belief, that on or about the day of , 189 , there was duly presented to the said administrator, George W. Nellis, the other of said claims heretofore mentioned for the amount respectively of each, and they were by said administrator duly allowed and filed.

Ninth. Plaintiff further alleges that the personal property and estate of said deceased was not and is not of sufficient value to pay any of the debts of said deceased, much less the claims of the plaintiff, and that said decedent left no personal property out of which claims of creditors can be paid, and that the account of said administrator as filed in the Surrogate's office of Fulton county on the 13th day of January, 1896, shows no assets in his hands as proceeds of the estate of said deceased.

Tenth. Plaintiff further alleges that said claims have not been paid or any part thereof.

Eleventh. Plaintiff further alleges that the foregoing-described real estate is the only property of said deceased remaining to pay the claim herein set forth, and is the only property that said deceased died seized of, and that the value of said property will not exceed the sum of about one thousand dollars (\$1,000).

Twelfth. Plaintiff further alleges that William R. Nellis, Eliza J. Young, Ida M. Borik and George W. Nellis and Earl Hoke, are the only heirs and next of kin of the said Asenath E. Nellis, deceased, and that their

interest in said property is as follows: The said George W. Nellis has a tenancy by the courtesy, and that said William R. Nellis, Eliza J. Young, Ida M. Borik and Earl Hoke have an equal undivided one-fourth part thereof.

Thirteenth. Plaintiff further alleges that prior to the commencement of this action each and every one of said accounts were duly sold, assigned and transferred to this plaintiff, and that he is now the owner and holder thereof, and the same have not been paid or any part thereof.

Fourteenth. Plaintiff further alleges that more than three years have elapsed since the death of said Asenath E. Nellis, deceased, and more than three years have elapsed since letters of administration upon her estate were granted within the State of New York.

Wherefore, plaintiff demands judgment against the defendants herein as the heirs-at-law and next of kin of the said Asenath E. Nellis, deceased, as each of his or her interest appears, for the sum of two thousand sixty-four dollars and eighty-nine cents (\$2,064.89); and that such judgment be decreed a lien upon said real estate, and that execution issue against it, and that the same be sold to pay such judgment, together with the costs and disbursements of this action.

CLARENCE W. SMITH,

Plaintiff's Attorney,

2 South William Street,

Johnstown, N. Y.

(Verification.)

Order Staying Proceedings Pending a Petition to Sell Decedent's Real Property.

(See text, page 361.)

At a Special Term of the Supreme Court of the
State of New York, held at the Court House in
the city of Johnstown, N. Y., on the day
of , 189 .

Present — Hon. M. L. Stover, Justice.

SUPREME COURT — FULTON COUNTY.

WILLIAM R. NELLIS, Plaintiff,

against

GEORGE W. NELLIS, ELIZA J.

YOUNG, IDA M. BORIK and

EARL HOKE, Defendants.

It appearing that the above-entitled action was commenced in this court by the service of a summons and complaint on the defendants herein on the day of , 189 ; and it also appearing to the court that at the time said action was begun to recover for claims owing and due by said decedent, Asenath E. Nellis, and to declare said claims a lien against said decedent's property; and that prior to the commencement of said action a petition had been seasonably presented to the Surrogate's Court of the County of Fulton, for a sale of said decedent's real property to pay her debts; now, on motion of M. D. Murray, Esq., attorney for the defendants, it is ordered, that said action and all proceedings subsequent to the said complaint be and the same are hereby stayed until the said petition to dispose of said decedent's estate is fully completed, or at the option of the plaintiff said action may be discontinued.

Enter in Fulton county.

M. L. S.,

J. S. C.

(See text, page 361.)

Present — Hon. M. L. Stover, Justice.

WILLIAM R. NELLIS, Plaintiff,

GEORGE W. NELLIS, ELIZA J.
YOUNG, IDA M. BORIK and
EARL HOKE, Defendants.

It appearing that the above-entitled action was commenced in this court by the service of a summons and complaint upon the defendants herein on the _____ day of _____, 189____; and that prior to the commencement of said action a petition to sell the said decedent's real property was presented to the Surrogate's Court of the County of Fulton and State of New York; that said proceedings have been fully carried out in all respects and fully completed as required by law; and that said decedent's real property has been sold in pursuance of said petition and proceedings; and that the said decedent has no other property out of which the plaintiff in this action can recover his claim as alleged in his complaint; and that said plaintiff has not alleged in his complaint or in the supplemental complaint that any other property belonging to the said decedent has descended to the said defendants or any other devisees, other than what was included in the decree of sale, in the proceedings to sell the said decedent's real property. Now, on motion of M. D. Mur-

ray, Esq., attorney for the defendants, and no one appearing in opposition thereto, it is

Adjudged, That the said complaint and action herein be and the same is hereby dismissed, without costs to either party.

Enter in Fulton county.

M. L. S.,
J. S. C.

(NOTE.—The notice of application for the above-entitled order must be made on all the parties of the hearing herein.)

Answer of Defendant.

(See text, page 365.)

SUPREME COURT — FULTON COUNTY.

WILLIAM E. NELLIS, Plaintiff, against
--

GEORGE W. NELLIS, ELIZA J. YOUNG, IDA M. BORIK and EARL HOKE, Defendants.
--

The defendant, Ida M. Borik, answering the complaint of the plaintiff herein:

First. Admits that part of the plaintiff's complaint contained in counts first, fourth, twelfth and fourteenth thereof.

Second. Upon information and belief, denies each and every allegation in said complaint contained not herein expressly admitted, qualified or explained.

Third. For a further and separate answer herein to the plaintiff's complaint, the defendant, Ida M. Borik, upon information and belief, alleges that the said Asenath E. Nellis, referred to in plaintiff's complaint, at the time

of her death was the owner of a quantity of personal property of the value of upwards of three hundred and fifty dollars (\$350), all of which was liable for the payment of the lawful debts against the estate of the said Asenath E. Nellis, and which should have been exhausted or applied in liquidation of any lawful debts against the estate of the said Asenath E. Nellis, before the real estate of which said Asenath E. Nellis died seized, can be charged or used in payment of such debts, or any action maintained to charge same upon any real estate of which said Asenath E. Nellis died seized.

Fourth. The defendant, Ida M. Borik, alleges that said Asenath E. Nellis at the time of her death was indebted to this defendant Ida M. Borik in the sum of twenty-seven dollars and forty-two cents (\$27.42), and that the estate of the said Asenath E. Nellis is now indebted to said Ida M. Borik in the amount above stated.

Fifth. For a further and separate answer and defense herein, the defendant, Ida M. Borik, upon information and belief, alleges that the several alleged causes of action set forth in plaintiff's complaint did not accrue at any time within ten years next before the commencement of this action, nor within ten years, and such additional time as is allowed to the plaintiff for the commencement of this action.

Sixth. For a further and separate answer and defense, the defendant, Ida M. Borik, upon information and belief, alleges that at the time of the commencement of this action no final accounting has been had before the Surrogate of Fulton county by the administrator of the estate of said Asenath E. Nellis, and the account of said administration has not been allowed by the said Surrogate, regarding his trust and his deposition as such administrator of the personal property belonging to said Asenath E. Nellis at the time of her death (and that there is pending

before the Surrogate of Fulton county proceedings instituted by George W. Nellis, said administrator of the estate of said Asenath E. Nellis, in which Clarence W. Smith, plaintiff's attorney herein, appears as attorney for said administrator, for a final accounting and settlement of his trust as such administrator, wherein it will be determined whether there exists sufficient personal property belonging to said estate to pay all lawful debts of said Asenath E. Nellis, deceased).

Seventh. That the proceedings above referred to before the said Surrogate, for a final accounting, all of the several claims and demands contained in the plaintiff's complaint, were presented by the plaintiff herein, and objections were duly filed by several of the heirs of the said Asenath E. Nellis to the same. That said claims are a subject of dispute, are being contested in the said proceedings now pending before said Surrogate, and are now subjects of investigation and judicial determination before said Surrogate of Fulton county, N. Y. And the fact whether the personal assets of the said Asenath E. Nellis are sufficient to pay and discharge all, or what portion of the lawful debts against the estate of said Asenath E. Nellis, is at issue and will be determined in said proceedings now pending before said Surrogate. That said proceedings before the Surrogate of Fulton county, N. Y., has not been completed, nor has it yet been determined by said Surrogate that the creditors of said Asenath E. Nellis have been, or will be unable to collect their debts or some part thereof, out of the personal estate of said Asenath E. Nellis.

That the remedy sought by the plaintiff as a creditor of said Asenath E. Nellis, against the personal estate, in the said proceedings before the Surrogate of Fulton county, has not been exhausted, and is now pending.

Eighth. That said Asenath E. Nellis owned at the time of her death more than sufficient personal property to pay

all lawful debts against her, and all debts and expenses lawfully incurred against her estate since her death.

Wherefore, the defendant demands a dismissal of the complaint, with costs.

M. D. MURRAY,
Defendant's Attorney,
Johnstown, N. Y.

(Verification.)

(NOTE.— As to Statute of Limitations, see text, page .)

Order of Reference.

At a Trial and Special Term of the Supreme Court of the State of New York, held at the Court House in the city of Johnstown, Fulton county, on the 14th day of June, 1897.

Present — Hon. Martin L. Stover, Justice.

WILLIAM R. NELLIS, Plaintiff, against
--

GEORGE W. NELLIS, ELIZA J. YOUNG, IDA M. BORIK and EARL HOKE, Defendants.

Upon reading and filing the stipulation of the attorneys for the respective parties to this action dated June 11, 1897, for reference of all the issues in this action to Fred Linus Carroll, Esq., of Johnstown, N. Y., as sole referee, and upon motion of Clarence W. Smith, Esq., plaintiff's attorney, it is

Ordered, Pursuant to said stipulation, that this said action and all the issues therein be and the same are referred to Fred Linus Carroll, Esq., of Johnstown, N. Y., as sole referee, to hear and determine.

Clerk of Fulton county enter.

M. L. S.,
J. S. C.

Final Judgment.

(See text, page 366.)

SUPREME COURT — FULTON COUNTY.

WILLIAM R. NELLIS, Plaintiff,

against

GEORGE W. NELLIS, ELIZA J.
YOUNG, IDA M. BORIK and
EARL HOKE, Defendants.

The above-entitled action having been duly referred to Fred Linus Carroll, as referee herein, to try, hear and determine the issues as framed by the pleadings in the above-entitled action, and to make his report to this court; and the said referee having reported to this court, and which said report has been in all things confirmed by an order duly entered herein on the day of , 189 , by which said report and order it is found and decided that the plaintiff is entitled to recover of the defendants the amount of dollars as the amount due to the plaintiff upon the claim and debt against one Asenath E. Nellis, deceased; and it having been further found and decided by said referee in said order named, that said claim is a lien upon, and against the property hereinafter described. Now, on motion of Clarence W. Smith, Esq., attorney for the plaintiff, it is

Ordered and adjudged, That the plaintiff, William R. Nellis, have and recover of the defendants herein, the sum of dollars, together with the interest thereon from the day of , 189 ; also the sum of dollars, as his costs and disbursements of this action, which have been taxed; and it is further

Adjudged and directed, That said amount be collected out of the real property which has descended to the defendants from the said Asenath E. Nellis, deceased, and

which said property is described as follows, to wit: (Description); and that execution do issue therefor.

C. H. BUTLER,
County Clerk,
Fulton County.

(NOTE.— The above is sufficient if upon a verdict of the jury on a trial of said action, striking out the clause as to the reference and inserting upon the verdict of the jury; if it is upon the report of the referee, then the order confirming the referee's report must be entered, upon which said judgment is based.)

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